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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

JOSEPH ASH,

Petitioner

v.

STERNWEST CORP.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

This is a case in which the prevailing party in the lawsuit appealed from insufficiency of attorney's fees awarded. The Court of Appeal then exceeded its jurisdiction by ruling on matters which were not on appeal, but were final and not even briefed.

It also ordered (by sua sponte order and without briefing on the subject stating it knew of no authority), attorney's fees to the party who lost the lawsuit, since "he was prevailing party on appeal." All subsequent efforts to consider the merits on actual briefing were rebuffed- petitions for rehearing and discretionary state supreme court review summarily denied.

A federal lawsuit for injunctive relief for due process violation was dismissed as being without jurisdiction (with implication that the state judicial avenues were available). However, when the actual trial court award of such fees was directly and

properly appealed, the Court of Appeal refused to consider the merits, stating the sua sponte order was "law of the case."

Thus, there was and is no federal or state court to review original Constitutional transgressions of the state appeal court.

So a fundamental question re: due process is: 1) What forum is available to a litigant to address original Constitutional violations of a state reviewing court?

2. May a suit be maintained in U.S. District Court for injunctive relief under 42 USC 1983, etc., against a state court and its members for violations of Constitutional guarantees (due process, etc.)?

3. May state "law of the case" procedure override federal due process and jurisdiction guarantees? What criteria constitute "due process adjudication?" May an appellate court refuse to review an appealable order on the grounds that a previous sua sponte dicta order (made without benefit of

briefing and later found at variance with established law) constitutes such "adjudication" and thus precludes further examination?

4. What remedies exist if a state Court of Appeal bases its decision on Respondent's citation of transcripts in its brief, but which transcripts the Court had previously ordered stricken and returned and not replied to by Appellant? Does this constitute federal due process violation?

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JOSEPH ASH (ASH) petitions for a Writ of Certiorari to review the decision of the Court of Appeal of the State of California, Second Appellate District.

OPINIONS AND ORDERS BELOW

The decision of the Court of Appeal (B042634 consolidated with B047789, B052700) is annexed as Exhibit A.

The earlier decision of the United States Court of Appeals for the Ninth Circuit relating to this case (dismissing the federal lawsuit) as Exhibit B. The earlier appellate decisions in this case necessary and relevant to the opinion reviewed: B017945 as Exhibit C, B027482 as Exhibit D.

Relevant Report of the County Clerk regarding the case as Exhibit E.

The denial of the Petition for Rehearing of B042634 and the Order of Modification as Exhibit F. Denial of state Supreme Court review as Exhibit G.

JURISDICTION

The decision of the Court of Appeal was filed on 9-23-91. A timely Petition for state Supreme Court Review was denied on December 18, 1991. Jurisdiction is invoked by 28 USC 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

1. **The Fifth Amendment** provides in part: "No person shall . . be deprived of life, liberty, or property, without due process of law."

2. **The Fourteenth Amendment** provides in part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATUTES INVOLVED

1. **28 USC 1343(3)** states that U.S. District Courts have jurisdiction:

[T]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all all persons within the jurisdiction of the United States.

2. **42 USC 1983**

Every person who, under color of any statute, ordinance, regulation, custom, or

usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

STATEMENT OF THE CASE

The appeal came about after Ash was sued by Sternwest, Corp., won what the Court of Appeal in B017945 and B027482 characterized as "long and difficult litigation," and was awarded his defense costs, including a previous appellate direction (in B017945, Exhibit C) that pre-judgment interest be awarded on those costs.

When they were not, he appealed again (B027482), strictly limiting his appeal to those items. However, the Calif. Court of Appeal **exceeded its jurisdiction** in ruling on matters **which was excluded from appeal, had become final, and had not been briefed.**

The appellate decision (Exhibit D) also

included a **sua sponte** direction for **Calif. Civil Code** (CC)§1717 attorney's fees (which provides for fees, including appellate fees, only to the one party winning on a contract providing for such fees), stating it knew of no authority regarding this issue, but **permitting no briefing on it.**

However, there is voluminous authority holding an award of attorney's fees to the losing party as **void.**

(CC §1717 is similar to federal civil rights litigation re: "prevailing party.")

This case is compelling because **the acts complained of are original acts of the Court of Appeal, not acts being reviewed.**

Accordingly, when the Court of Appeal refused to grant a mandatory due process rehearing on the portions of the order not briefed and beyond the appeal, and the Calif. Supreme Court refused to grant discretionary review, Ash had no redress except to sue in U.S. District Court for

injunctive relief for violation of federal civil rights of due process.

The U.S. District Court dismissed the case on the grounds that no U.S. District Court may entertain any suit involving a state judiciary, even for injunctive relief. The U.S. Court of Appeals affirmed the dismissal on the same grounds.

The implication of both courts was that avenues of relief were available in the state court. Accordingly, when the trial court followed the directions of the state appeal court and awarded $20,000 attorney's fees to Stern as "prevailing party" on the appeal, refusing to consider the propriety of the award, but rather inviting another appeal to test it, Ash did so.

However, on that appeal (B042634, Exhibit A) which is the appeal now before this Court, the Court of Appeal refused to review the propriety of the fees, stating that the previous B027482 appellate

direction was "law of the case," despite the fact that it was not the subject of B024782, was made **sua sponte** without affording any briefing (and with the admission that the Court "was aware of no authority" on the subject), and is prohibited by Calif. law.

A timely Petition for Rehearing and for Supreme Court Review were summarily denied.

In other words, Ash was fined over $20,000 on a void order without any due process, and each court has merely relied on that order without permitting any adjudication on the subject. Ash was turned away from the only forum for relief, the U.S. District Court, with the suggestion that the state court would adjudicate the matter.

But that has not and will not happen.

Ash was also sanctioned considerable money for successfully vacating a judgment debtor exam order obtained by Stern (which was void because Ash's B042634 appeal automatically stayed such enforcement),

sanctioned because he made it ex-parte (the stated procedure under case law).

The various sanction orders were also appealed (B047789 and B052700) and were consolidated in the B042634 appeal.

During briefing, Stern untimely introduced exhibits which it then quoted in its brief. However, those exhibits were ordered stricken by the Court with no reference permitted to them (even in Ash's Reply).

However, the Court did not require Stern to resubmit its briefs with the deletions.

Nevertheless, the Appellate Decision relied upon and quoted the passages from Stern's brief which referenced the stricken material. Rendering a judgment based on stricken evidence is a due process violation.

All of the above federal due process violations were brought to the attention of the court at each stage of the proceedings, including the Petition for Rehearing and

Petition for Calif. Supreme Court Review in B027482, the U.S. District Court injunctive action and subsequent federal appeal, the subsequent state trial court proceeding awarding Stern the $20,000, and the subsequent B042634 consolidated appeal with its subsequent rehearing petition and Petition for Supreme Court Review.

To this date, all courts have refused any adjudication. The B042634 was a direct appeal of the $20,000 plus award requiring mandatory adjudication. With refusal to do so, it now becomes clear that the state court is not going to afford Ash due process.

The only reasonable avenues of review, herein, are the Calif. Supreme Court, or the U.S. District Court. Accordingly, we request that the Calif. Supreme Court be ordered to review the actions and allegations of excess of jurisdiction of the state Court of Appeal. Further, that this Court rule that Ash is not barred from seeking

injunctive relief against the state court in the U.S. District Court.

In fact, with the previous injunctive federal lawsuit against the state Court of Appeal, we believe Petitioner herein has become so "persona non-grata" with the state court, that no reasonable fair adjudication or due process on this matter can even be had other than in the federal courts.

Facts Regarding the State Action

Stern sued Ash under a contract. After years of litigation, Ash prevailed.

Because the contract sued under provided for attorney's fees to the prevailing party, Ash was awarded attorney's fees under **Calif. Civil Code (CC) §1717** [which provides for fees to the prevailing party on the contract if the contract provides for fees].

Ash appealed the fees as inadequate. He won and enhancements and interest were ordered. However the trial court failed to follow the appellate directions, so Ash

appealed again. Ash strictly limited his notice of appeal from the portion of the appealable order "TO THE EXTENT THAT NO INTEREST IS APPLIED OR AWARDED FOR PERIODS PRIOR TO APRIL 11, 1985."

Upon appeal, a new appellate judge upheld the old award. He then, however, went beyond his jurisdiction in two respects:

1) He reduced the award of interest for periods **after** April 11, 1985, though this was not on appeal, was final, and was not argued. **This was an act beyond the jurisdiction of the Court. Whalen v Smith** (1912) 163 C 360, 125 P 904; **Glassco v El Sereno County Club** (1932) 217 C 90, 17 P2d 703 [language of notice of appeal held determinative]; **Blum v San Francisco** (1962) 200 CA2d 642, 19 CR 574 [**appeal from denial of interest for a specified period of time does not affect finality of other parts of judgment not appealed from.**]

2) The Appellate Judge awarded CC §1717

fees on appeal to Stern (approximately $20,000), though no such fees were requested by Stern nor argued in the briefs. Further, Ash was and remains the prevailing party on the contract and in the lawsuit.[1/]

[1/] It is established law that CC §1717 fees can only be awarded to the one party who prevails on the contract in the underlying lawsuit, not on interim appeals. **Bank of Idaho v Pine Ave. Assoc.** (1982) 137 CA3d 5, 186 CR 695; **Presley of So. Calif. v Whelan** (1983) 146 CA3d 959, 196 CR 1; **Distefano v Hall** (1968) 263 CA2d 380, 387, 69 CR 691.

(See also analogy in **Jensen v City of San Jose** (9th Cir en banc, 1986) 806 F2d 899 [litigant cannot recover attorney's fees as "prevailing party" on appeal of issue of attorney's fees if he did not win on the merits of the underlying litigation.)

Accord, Arnold v U.S. (9th Cir 1987) 816 F2d 1306, 1313 ["Parties may not receive attorney's fees for any appeal if they have not succeeded on the merits of their underlying claims."]

American Constitutional Party v Munro (9th Cir 1981) 650 F2d 184 [mandated "the denial of attorney's fees where plaintiff had not shown 'some dort of clear, causal relationship between the litigation brough and the practical outcome realized.'"]

Hensley v Eckerhart (1983) 461 US 424, 433, 103 S.Ct. 1933, 1939 ["Are 'prevailing parties' if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit."]

Under **Jones v World Life Research Institute** (1976) 60 CA3d 836, 846, 131 CR 674 and **Abelleira v Dist Court of Appeal** (1941) 17 C2d 280, 289, 109 P2d 942 (citing **Michel v Williams** (1936) 13 CA2d 198, 576 P2d 546), an award of costs in a situation not provided by statute is **not merely erroneous, but void.**

Ash then timely filed a petition for rehearing before the state appellate court, to address the issue of the modification of the portion of the order which was final and not appealed (post-April 1985 interest) and the award of CC §1717 fees to Stern. **A rehearing was denied without comment.**[2/]

A timely petition to the Calif. Supreme Court was summarily denied. Accordingly, **no review of the original acts of the Court of Appeal was ever made.**

2/ (Note Calif. Gov. Code §68081, which mandates such rehearing, as a backup to required due process, when a decision is made upon an issue which was not briefed).

Petitioner Then Sought Injunctive Relief in Federal Court

Ash also filed an action in U.S. District Court for injunctive and declaratory relief for violation of federal civil rights of due process under color of state law.

The grounds were that the state Court of Appeal had exceeded its jurisdiction in depriving Ash of $20,000 without due process, by ruling on a matter which was final, excluded from appeal, and beyond the jurisdiction of the court, and in awarding fees to Stern in violation of state law, were void by law and thus in excess of jurisdiction, and where no briefing on the subject had been allowed. (Stern requested only Calif. Rule 26(a) fees for frivolous appeal, which were denied).

Further, that failure to grant a mandatory rehearing, per Calif. Gov. Code 68081, to address the issues not previously briefed, was also in excess of jurisdiction.

The U.S. District Court dismissed the action on the grounds that **District of Columbia Court of Appeals v Feldman** (**Feldman**) (1983) 460 US 462, 103 S.Ct. 1303, 75 L.Ed2d 206, **Worldwide Church of God v McNair** (9th Cir 1989) 805 F2d 888, and **Al-Hakim Allah v Superior Court** (9th Cir 1989) 871 F2d 887, absolutely precludes intervention into a state court matter under any circumstances.

The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal on the grounds that the U.S. District Court:

> "did not have jurisdiction over Ash's claim. . . **Dist. of Columbia Court of Appeals v Feldman** (supra) (stating that the United States district courts have no jurisdiction over challenges to state court decisions); **Worldwide Church of God v McNair** (supra) (holding that the district court lacked subject matter jurisdiction over a state court judgment and that the proper procedure was to obtain review in the United States Supreme Court)." (Exhibit B)

The Second State Appeal Followed the Federal Appeal Denial

Thereafter, the trial court, pursuant to the B027482 directions, awarded $20,000 appellate CC §1717 fees to Stern, declining to entertain any briefing or hear any argument regarding the propriety of those fees, but stating it was bound to follow the B027482 directions.

However, the trial court invited an appeal, which Ash took (B042634). Meanwhile, Stern attempted enforcement action (even though enforcement of a judgment for costs alone, including attorneys fees is automatically stayed upon appeal) by obtaining an ex-parte debtor exam order from a Commissioner unfamiliar with the case and not aware an appeal was pending.

Ash succeed in vacating that order, but was sanctioned for doing so, which he also appealed (B052700), as well as appealing another sanction order (B047789) for

unsuccessfully moving to set aside an improper calculation of interest order (which order was found incorrect and vacated on appeal by Ash).

The two sanction order appeals were consolidated with the main B042634 appeal from attorney's fees to Stern. The orders were all affirmed (Exhibit A).

The Clerk of the Los Angeles Superior Court provided declarations (Exhibit E) showing that Ash's calculation of interest, the subject of the original B027482 appeal, was correct, and the B027482 Opinion is in error and a clerical miscalculation.[3/]

The B042634 Decision ignored all of this, refusing to adjudicate anything, but merely repeating the sua sponte B027482 direction as "law of the case."

3/ Under **Jones v World Life Research**, supra, such interest miscalculation is a void order, not a mere erroneous one, and can be attacked at any time. Thus, the B027482 Decision was totally wrong, and on that basis alone, no fees could be awarded Stern.

The Appellate Court refused to address the propriety of the fees to Stern, which was the first opportunity for mandatory adjudication after briefing of this issue, stating that the previous B027482 (sua sponte) Appellate opinion was "law of the case."

Further, as previously shown, the appeal decision relied upon stricken evidence. It also quoted a hearsay declaration by Stern (e.g., the trial judge said so and so).

Timely petitions for Rehearing and for Calif. Supreme Court Review was summarily denied, and this Petition follows.

REASON FOR GRANTING THE WRIT

Petitioner is entitled to but has been denied any forum. But every person is entitled to redress of grievances.

It does not matter where the deprivation comes from.

Stern is fond of stating how many times this matter has been "adjudicated," citing the various petitions etc. Ash has taken.

But that is just the point. "Attempts" is not the same as "receiving." As stated in **Black's Law Dictionary**, "It implies a hearing by a court, after notice, of legal evidence on the factual issue involved."

Here, the Court of Appeal did not merely error in reviewing a state trial court judgment. It went beyond its jurisdiction, and committed its own **original** torts or violations under color of state authority.

Stern has argued that the U.S. District Court has no authority to review state court judgment. Had the state trial court exceeded its jurisdiction, and the Court of Appeal adjudicated that violation of federal due process, Stern's argument would be palatable.

However, here it is the Court of Appeal which rendered the original acts in excess of jurisdiction and in violation of due process. And it is the state Court of Appeal which thereafter refuses to even look

at its own previous order, claiming "law of the case." The only state court to available to review is the Calif. Supreme Court, which declined review. (These days it is declining virtually all civil cases, due to its death penalty case load).

State Law Denial of Adjudication Conflicts With Constitutional Due Process

What is involved here is conflict between federal Constitutional due process and State law.

As stated in **Mathew v Eldrige** (1976) 96 S.Ct. 893, 424 US 319, the fundamental requisite of due process is opportunity to be heard at a meaningful time and in a meaningful manner. Accord, **Orloff v Cleland** (9th Cir 1983) 708 F2d 372.

A fundamental purpose of the due process clause is to allow aggreived party the opportunity to present his case and have its merits fairly judged. **Pollack v Baxter Manor Nursing Home** (CA Ark 1983) 716 F2d 545.

As stated in **St. Clair v Righter** (1966 D.C. Va) 250 F.Supp 148:

> The jurisdiction of a court is purely and simply a question of power- the power to create or affect legal interest which will be recognized as valid elsewhere. **A limit is put on this power by due process considerations of the U.S. Constitution.**

(See also **In re Monroe** (1891) 56 F 52 [state court order in excess of jurisdiction is deprivation of due process]).

Here, the state Court of Appeal violated due process in several ways. 1) It exceeded its jurisdiction in ruling on a matter which was specifically excluded from appeal;

2) It rendered a **sua sponte** order for attorney's fees to Stern as "prevailing party," without any briefing and while admitting it knew of no authority, though this was not the subject of that appeal. It then refused to accept any briefing or allow any hearing on the matter to show that its order was against the law and was also void;

3) It then refused to adjudicate the

propriety of those fees when they came on direct appeal.

And since the Calif. Supreme Court will not hear the matter, the Court of Appeal is the only court level which can deal with this. In a sense, it is a conspiracy of that court to impose its order no matter whether it has jurisdiction or not, and whether there is due process or not, because it is not accountable.

Chambers v Miss. (1973) 93 S.Ct. 1038, 410 U.S. 284, stated that the asserted denial of due process in state court evidentiary ruling was properly before the U.S. Supreme Court, though Constitutional basis for objection to such rulings were not asserted until motion for new trial and though state supreme court failed to address the Constitutional issue.

In intervening, this Court is left with three choices: 1) A direction to the state Court of Appeal to exercise due process and

adjudicate the merits, or an adjudication of those merits itself; 2) A direction for the state Supreme Court to correct denial of due process by hearing the case; 3) An Opinion that the U.S. District Court is a proper court for injunctive relief against the state court.

In fact, we believe a U.S. District Court would be preferable since the state Court of Appeal justice who rendered the B027482 Decision from which all this trouble stemmed, now sits on the Calif. Supreme Court. Thus the reality is that no fair adjudication in state court may be possible, which may explain why no state judge or justice wants to adjudicate the propriety of Ash's complaints.

THERE IS PRECEDENT ALLOWING COURT MEMORANDUM TO AFFIRM AVAILABILITY OF FEDERAL INJUNCTIVE COURT ACTION

With the heavy case load, a full briefing before this Court is not really necessary.

There is precedent for this procedure.

E.g., in **Mireles v Waco** (1991) 112 S.Ct. 286, this Court by Memorandum without briefing, but simply based on the Petition for Certiorari and the response, reversed a appeal which allowed a litigant to sue an L.A. Superior Court judge for damages.

Mireles, at footnote 1, also stated:

> The Court, however, has recognized that a judge is not absolutely immune from criminal liability, **Ex Parte Virginia**, 100 US 339, 348-349, **or from a suit for prospective injunctive relief, Pulliam v Allen**, 466 US 522, 536-543 (1983) . .

See also **Will v Michigan Dept. of State Police** (1989) 109 S.Ct. 2304, fn 10:

> Of course a State official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because "official-capacity actions for prospective relief are not treated as actions against the State." **Kentucky v Graham**, 473 US at 167, n. 14; **Ex parte Young** (1908) 209 US 123. This distinction is "commonplace in sovereign immunity doctrine," L. Tribe, American Constitutional Law §3-27, p. 190, n. 3 (2d ed. 1988), and would not have been foreign to the 19th-century Congress that enacted §1983.

We note in **Mireles v Waco**, supra, this Court quickly and without briefing, reversed a 9th Circuit decision and hold that a judge cannot be sued for damages.

Yet the 9th Circuit in this case has held that even injunctive relief against state court is not available. Should not that error also be corrected by Memorandum?

Should not making clear the allowance of a forum to its citizens for injunction to correct a state court denial of due process be as important as protecting a judge's immunity from damages?

THE NINTH CIRCUIT COURT OF APPEAL IN THIS CASE STATED THAT U.S. DISTRICT COURTS MAY NOT BE USED FOR CIVIL INJUNCTIVE RELIEF AGAINST A STATE COURT

As shown in Exhibit B, the denial of a federal forum to Ash stemmed directly from the U.S. District Court's and U.S. Court of Appeal's interpretation of this Court's **District of Columbia Court of Appeal v Feldman** (1983) 460 US 462, 103 S.Ct. 1303.

The Federal trial and appeal courts appear to believe that the **Feldman** case now precludes all injunctive actions against state courts, even when the acts complained of are the original acts of a Court of Appeal with no state review possible if the state Supreme Court declines review.

They assert that the only relief available when federal due process is violated with no state review possible is the U.S. Supreme Court. With Certiorari rarely given, this would be the equivalent of no due process review possible.

This is an important nationwide question. The Supreme Court is the proper court to supervise the federal court and to state what kinds of suits are permitted.

We believe this is the classic case for this, since it involves excess of jurisdiction and due process denial by a state Court of Appeal, not review by a state Court of Appeal of a lower court judgment.

This is the distinction that the U.S. District Court and U.S. Court of Appeal did not recognize in this case, when it cited **Worldwide Church of God** (9th Cir 1986) 805 F2d 888. In **Worldwide**, the L.A. Superior Court tried the 1st Amendment Constitutional issues of freedom of religion.

The federal court then held that those federal constitutional issues had thus already been litigated, and that the state court was in just as good of a position as the federal court for such litigation:

> ["In the case before us, the Calif. Superior Court **considered and rejected** the plaintiff's argument that the allegedly defamatory statements were constitutionally protected." [It was also reviewed by the State Court of Appeal (197 CA3d 363)].

In fact, **Worldwide** itself states:

> **Robinson v Ariyoshi** (9th Cir 1985) 753 F2d 1468, 1472 (vacated on other grounds) contains this court's only detailed discussion of **Feldman's** language. In that case, the issue was whether federal constitutional issues that the state court had refused to consider on a petition for rehearing should be deemed "inextri-

cably intertwined" with the state court's judgment.

And as **Robinson** states:

> Faced with the task of deciding our power to review constitutional issues which arise from a state court proceeding, we view the res judicata requirement of full and fair opportunity to litigate, and the **Feldman** 'inextricably intertwined' barrier as two sides of the same coin.
>
> Under the rubic of either 'jurisdiction' or 'res judicata,' the crux of the question is whether there has already been actual consideration of a decision on the question presented. . . If no consideration has been given, or any decision on the matter is ambiguous, it is unlikely that the issues presented to the state high court and to the federal court are so 'inextricably intertwined' that the federal court cannot take jurisdiction. . .
>
> [W]e find that Robinson's due process claims were not and could not have been litigated in the McBryde state proceedings because the Hawaii Supreme Court refused to consider Robinson's federal claims. .
>
> . . .

In **Harring v Prosise** (1983) 462 US 306, 103 S.Ct. 2368, 2373, the Supreme Court noted that in a §1983 action, collateral estoppel effect will not be given to a state court conclusion **where the complaining party did not have a full and fair opportunity to litigate a claim in state court or where the state court demonstrated inability or unwillingness to protect**

federal rights. .

Turning to the application of the **Feldman** doctrine, we cannot see how federal constitutional issues which the state court refused to consider on a petition for rehearing are at all, let alone inextricably intertwined with a previous recent state court judgment on riparian rights. .

When a state court has refused to entertain federal constitutional claims, a federal court violates the precepts of neither subject matter jurisdiction nor res judicata by hearing those claims. . .

. . .

We are loathe to grant less constitutional protection where plaintiffs have responsibly exercised an opportunity to raise their claims and have been turned away from the state tribunal without so much as an explanation. Like the court said in **Wood v Orange County** (11th Cir 1983) 175 F2d 1543, 1547, cert den 104 S.Ct. 2398, 467 US 1210, **we are concerned that such a result might deprive plaintiffs of any forum, state or federal,** where [they have] a reasonable opportunity to present [their] federal constitutional claims, **a result contrary to the requirements of due process.** . .

. . .

Rooker v Fidelity Trust Co. (1923) 263 US 413, 415, 44 S.Ct. 149, 150, made it clear that the only constitutional questions arising from a state proceeding on which the Supreme Court considered itself to be the final arbitrator were those that "actually arose in the case" in which a full hearing was held and where the

judgment was responsive to the issues. Otherwise, if **Rooker** were a blanket jurisdictional bar even if there had been no actual state court opportunity them, **Rooker** would swallow the "full and fair opportunity to litigate" limitation to res judicata clearly established elsewhere by the Supreme Court. See e.g., **Allen v McCurry** (1980) 449 US 90, 95, 101 S.Ct. 411, 415.

Allen v McCurry, supra:

> But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate **that issue** in the earlier case.

In **Miofsky v Superior Court of Calif.** (9th Cir 1982) 703 F2d 332, Miofsky moved for a protective order from discovery material in a state civil action. Upon denial he unsuccessfully sought relief through the Calif. Court of Appeal and the Calif. Supreme Court. He then filed a §1983 injunctive action in U.S. District Court.

The district court dismissed on grounds that Miofsky was really seeking federal

review of state court decisions. In reversing, the Court of Appeal stated:

> The very purpose of §1983 was to interpose the federal courts between the State and the people, as guardians of the people's federal rights- to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or **judicial.**" (Emphasis in original). . .
>
> In light of **Mitchum v Foster** (1972) 407 US 225, 92 S.Ct. 2151 (quoted above), **we conclude that district courts have subject matter jurisdiction over suits brought under §1983 even when the state action allegedly violating plaintiff's federally protected right takes the form of state court proceedings.**

As **Mitchum** continues at 92 S.Ct. 2162:

> And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a persons's constitutional rights.

White v White (9th Cir 1984) 731 F2d 1442:

> District courts have subject matter jurisdiction even when the state action allegedly violating plaintiff's federally protected rights takes the form of state court proceedings.

Goldies Bookstore v Superior Court (9th Cir 1984) 739 F2d 466, 468 fn1:

> In a recent case, we found subject matter jurisdiction where the private state litigants, the state court, and the state judge were the defendants in a section 1983 action brought to enjoin the enforcement of a state court judgment. See **White**, supra.
>
> Citing **Miofsky**, supra, for the proposition that district courts have subject matter jurisdiction over §1983 suits even when the state action takes the form of state court proceedings, we drew no distinction between the private party seeking to enforce the state court judgment ad the state parties charged with enforcing that judgment. We similarly make no distinction here.

See also **Davidson v General Finance** (1968) 295 F.Supp 878, 880:

> A federal court can review a judgment of a state court . . where the state court lacked jurisdiction of the subject matter or entered a judgment it had no power to enter, or judgment was obtained without due process. (**Daniels v Thomas** (10th Cir 1955) 225 F2d 795, cert den 350 US 932, 76 S.Ct. 303, reh den 350 US 977, 76 S.Ct. 430).

Also **Custom Leasing v Gardner** (1969) 307 F.Supp 161, 164:

> Sect. 11, Restatement of Judgment, states, "A judgment which is void is

subject to collateral attack both in the state where it is rendered and in other states." Section 5 of the Restatement of Judgment, states: "A judgment is void unless the state in which it is rendered has jurisdiction to subject to its control the parties or the property or status sought to be affected." **Thus a Federal Court can review the judgment of a state court where the state court lacks jurisdiction of the subject matter or entered a judgment it had no power to enter or the judgment was obtained without due process. Davidson**, supra.

In spite of the foregoing, the U.S. Court of Appeal ruled that **District Court of Appeal v Feldman**, supra, rendered by this Court, meant that one cannot sue a state court for injunctive relief, even under the compelling circumstances as exist with Ash, and even if no due process is available.

This Court rendered **Feldman**. What did this Court intend? Are federal courts available for redress against state courts in civil actions, or are they now only limited to criminal actions as the U.S. Court of Appeal implied?

THERE IS CONFLICT BETWEEN STATE "LAW OF THE CASE" AND CONSTITUTIONAL DUE PROCESS

The reason cited in B042634, for refusal to the propriety of $20,000 fees to Stern (who lost the lawsuit) is "law of the case."

That the order for this in B027482 cannot be challenged, despite being made without due process and such costs themselves being not merely erroneous, but void.

The conflict of "res judicata" and "collateral estoppel" with Constitutional due process, was already explored in the previously cited cases (**Allen v McCurry**, **Robinson v Ariyoshi**, etc.).

What is Calif. "law of the case?"

Says the Calif. Supreme Court in **Searle v Allstate Ins.** (1985) 38 Cal3d 425, 435:

> [T]he doctrine of law of the case . . is not inflexible. In **England v Hospital of Good Samaritan** (1939) 14 C2d 791, 97 P2d 813, a third appeal was taken to this court and we departed from the rule of law of the case noting that "a court is not absolutely precluded by the law of the case from reconsidering questions decided upon a former appeal. **Procedure and not**

jurisdiction is involved.

See also **Clemente v State** (1985) 40 C3d 202, 212, 219 CR 445:

> However, doctrine of law of the case which has been recognized as being harsh **is merely a rule of procedure and does not go to the power of the court. It will not be adhered to when it application will result in an unjust decision.**

In **Estate of Roulac** (1977) 68 CA3d 1026, 136 CR 492, a judgment was reversed with directions. Those directions, however, dealt with an issue not decided in the trial court. Held on subsequent appeal, that direction was not essential to the order appealed from, and thus not binding.

In short, "law of the case" quoted by the Court of Appeal as a reason for refusing to adjudicate, is superseded by "due process" if it resulted without an opportunity to actually litigate, or it violates jurisdiction or embraces a void order.

CONSTITUTIONAL DUE PROCESS REQUIRES THAT ADJUDICATION BE DIRECTED TO AN IMPARTIAL COURT, AND FEDERAL STATUTES PROVIDE FOR THAT

Here we have a situation where an appellate justice went far afield of the law, apparently for reasons outside of the law, and then proceeded to protect his order despite it unlawfulness, and despite the great harm to Ash; despite even the Court Clerks' revelations that the entire appeal itself was decided incorrectly. That order is even more protected today with his elevation to the state Supreme Court.

This state of affairs is illustrated with the realization that the appellate decision includes quotes from Stern's appellate brief to evidence which was ordered stricken and not replied to by Ash. Yet such stricken and now non-existent evidence is cited as basis for part of its decision.

It is fairly clear that no fair Constitutional due process was afforded or will be afforded by the state court in this

case. When faced with such a situation, litigants look to the federal court.

Dahl v City of Palo Alto (D.C. Cal. 1974) 372 F.Supp 647:

> 42 USC 1983 was an effort by Congress to provide a forum and a remedy for those whose civil rights were being violated, but who could get no relief in courts or agencies of their states.

Battle v Mulholland (CA Miss 1971) 439 F2d 321:

> A purpose of §1983 is to provide a forum for persons denied rights under color of state law if there is no remedy under state law or state remedies are inadequate, and further to provide remedy in federal courts supplementary to any remedy any state might have.

Ash looked to the U.S. District Court and was thrown out. We pray that this Court at least make a simple direction for due process adjudication in some court.

Respectfully submitted,

ROBERT G. LEFF
Counsel of Record

MILTON B. LIPTON (Of Counsel)

APPENDIX

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

9-2391

STERNWEST CORP.	) B042634
Plaintiff & Respondent	) Consolidated
v.	) with B047789
JOSEPH ASH,	) and B052700
Defendant & Appellant.	) Super.#C318375

APPEAL from an order of the Superior Court of Los Angeles County, Miriam A. Vogel and Dzintra I. Janavs, Judges. Affirmed.

Ralph F. Server and Milton B. Lipton (and Robert G. Leff) for Defendant and Appellant.

Feinberg, Gottlieb & Grossman and Mark S. Gottlieb for Plaintiff and Respondent.

On our own motion, we have consolidated three pending appeals from a single superior court action originally filed in 1980. Since 1980, one published opinion and three unpublished opinions have been filed by this appellate district in connection with this case.

In B042634, appellant Joseph Ash appeals from a postjudgment order awarding costs and attorney's fees on appeal to respondent

Sternwest Corporation. In B047789, appellant appeals from an order denying a motion to set aside an order imposing sanctions in the amount of $1,696 pursuant to Code of Civil Procedure section 128.5. In B052700, appellant appeals from an order imposing sanctions in the amount of $1,918 against appellant pursuant to section 128.5, denying appellant's request for sanctions against respondent, and denying appellant's request to transfer the matter to another judge.

We conclude that, in each instance, the court below did not abuse its discretion in making the order appealed from and affirm the orders.

FACTS AND PROCEDURAL BACKGROUND

On April 2, 1980, respondent filed an action against appellate in the superior court. On April 1, 1985, after the first appeal in this matter, the superior court dismissed appellant from the action. On

May 29, 1985, the superior court required respondent to post an $80,000 undertaking for costs and attorney's fees pursuant to Code of Civil Procedure section 1030.

Respondent posted the undertaking on June 17, 1985. On December 18, 1985, the superior court awarded appellant costs and attorney's fees under Civil Code section 1717. Appellant appealed from the post-judgment order awarding attorney's fees on the basis that the award was inadequate. Appellant prevailed on this second appeal.

On March 5, 1987, the superior court again awarded appellant costs and attorney's fees under section 1717. Appellant again appealed from this postjudgment order awarding attorney's fees on the basis that the award was inadequate. Respondent prevailed on this third appeal and was awarded its costs and attorney's fees on appeal by another division of this district.

The trial court was ordered to determine

the amount of costs and attorney's fees to be awarded.

On June 4, 1987, the $80,000 undertaking was released to appellant by stipulation of the parties. On March 28, 1989, the superior court awarded respondent costs and attorney's fees on appeal, in the amount of $19,952.25.

On April 3, 1989, respondent filed a motion to (1) quash writ of execution and levy of execution, (2) stay execution and levy, (3) determine amounts paid and owing, (4) compel acknowledgment of full satisfaction of judgment, and (5) assess sanctions. On June 1, 1989, the superior court quashed the writs of execution, appointed a referee to calculate amounts owed, disallowed interest on the judgment from June 17, 1985, and ordered that no new writs of execution be issued without permission of the court.

On June 6, 1989, appellant appealed from the March 28, 1989 postjudgment order

awarding respondent attorney's fees on appeal (B042634). This is one of the three consolidated appeals considered in this opinion. On August 25, 1989, appellant appealed from the June 1, 1989 order (B044466).

On December 15, 1989, appellant filed with the superior court a motion to set aside the June 1, 1989 order, as it related to the interest issue. In its opposition to this motion to set aside, respondent requested that sanctions be imposed on appellant pursuant to Code of Civil Procedure§ 128.5.

On January 8, 1990, the court denied appellant's motion to set aside and imposed sanctions against appellant in the amount of $1,696.

In its January 8, 1990 minute order, the court stated:

> "In any case, defendant is now arguing again what he argued in the briefs filed earlier before Judge Vogel **both** before the 5/8/89 hearing and after it. Oral argument is not a

matter of right and in this case, because defendant has filed repeated written arguments, lack of oral argument by attorney Server is not prejudicial. Furthermore, this Court has no doubt that defendant and his counsel received timely notice of all relevant rulings. Server's own declaration of 5/15/89 (Exhibit C to opposition) admits he had reviewed the tape recordings of the 5/8/89 hearing as of that date. Judge Vogel signed the written order of 6/1/89. [Server] filed notice of appeal from it on or about 8/25/89. This motion to set aside the order was not filed until 12/15/89. This court finds no excusable delay, surprise or inadvertent mistake from the deliatory seeking of §473 relief.

"In fact, this Court finds that this motion is frivolous and the filing of the motion is in bad faith and for purposes of harassment, in view of the pending appeal and the total lack of reasonable legal grounds for the motion, including the fact that the motion was not filed until almost four months after notice of appeal was filed.

"CCP 128.5 sanctions are therefore granted as requested by plaintiff, in favor of plaintiff and against defendant Joseph Ash and his counsel Ralph Server, in the amount of $1696.00."[1]

[1] Sanctions were ordered against both appellant and his attorney, Ralph Server. Only appellant has appealed. In the interests of justice, we will treat the appeal as by both appellant and his counsel.

On October 23, 1989, respondent obtained an ex parte order for judgment debtor examination (appellant), based on the costs and attorney's fees on appeal awarded to respondent. Appellant was served with the order on October 25. On December 13, 1989, counsel for appellant delivered an ex parte letter to former Superior Court Judge Miriam Vogel, requesting that she quash the judgment debtor examination order. This request was denied.

On January 4, 1990, appellant filed an ex parte application to vacate the order for judgment debtor examination. Superior Court Commissioner John W. Dickey denied the request.

On January 5, 1990, appellant's counsel delivered a letter to Superior Court Judge Dzintra Janavs. In his letter, counsel stated falsely that Commissioner Dickey told him to make the motion before Judge Janavs. He also stated falsely that Judge

Vogel had stayed all enforcement proceedings. He asked that a hearing on the ex parte motion be held on January 8, 1990. He gave no notice to opposing counsel.

On January 8, 1990, the ex parte request was denied by Judge Janavs. On January 11, 1990, appellant made still another ex parte application for the same relief. This time Judge Janavs vacated the judgment debtor examination order.[2/]

On January 22, 1990, appellant appealed from the January 8, 1990 order imposing sanctions. This is the second of the three appeals consolidated in this opinion.

2/ The January 11, 1990 minute order stated: "[Respondent's] counsel may move for C.C.P. 128.5 sanctions in connection with the ex parte applications herein. [Respondent's (sic, should read Appellant's)] counsel may move for whatever sanctions he deems appropriate for any conduct he considers sanctionable. [Appellant's] counsel is admonished for approaching Court without notice to opposing counsel on 1/10/90 in an attempt to have the ct. change its 1/8/90 order."

Respondent filed a request for sanctions pursuant to Code of Civil Procedure section 128.5. Appellant opposed the request for sanctions, requested sanctions against respondent, and requested that all further proceedings in the case be heard by Judge Deering, the superior court judge who originally awarded costs and attorney's fees to appellant in 1985.

On February 26, 1990, Judge Janavs imposed sanctions on appellant and his counsel in the amount of $1,918. She denied appellant's request for sanctions and his request to have the matter transferred to Judge Deering.

The minute order for February 26 stated:

"[Appellant's] ex parte application were unjustified and frivolous, there having been an adequate time to proceed on noticed motions. Furthermore, [appellant's] misrepresentations as to Judge Vogel having ordered stay and his conduct as described in

the Declaration of Mark Gottlieb constitute bad faith and frivolous conduct."3/

3/ The Declaration of Mark Gottlieb provided in relevant part:

"On Thursday, January 4, 1990, Defendant scheduled the first of three related ex parte hearings at 1"30 in Department 1A for the purpose of vacating the judgment debtor examination of Defendant on January 17, 1990. . . Despite two prior telephone calls to Mr. Server asking him to fax me copies of the ex parte application, I did not receive a copy until after 2:00 PM on January 4, when Hiram Ash (Defendant's son and Mr. Server's paralegal) brought the papers into the court. Even when the papers arrived at court more than one-half hour late, Mr. Server was not yet ready to proceed because he neglected to obtain the court file. When Mr. Server finally obtained the file, we were required to wait until almost 3:30 before Commissioner Dickey could review the papers and the file. After consideration of this declarant's reasons for opposing the ex parte application, Commissioner Dickey denied the motion. Outside of Commissioner Dickey's chambers, Mr. Server advised me that he would make another motion. I told him that he could not do so because it had just been denied and that his only remedy was to file yet another appeal.

"On Monday, January 8, 1990, this declarant and Mr. Server were present in Department 88 for a hearing on other matters in this case. At that time, this declarant discovered that Mr. Server submitted the identical ex parte motion to department 88 on January 4 or January 5, 1990. Apparently, Mr. Server advised this court that Commissioner Dickey had sent Mr. Server to

Appellant appealed from this sanctions order on August 28, 1990.[4/] This is the third of the three appeals consolidated in this opinion.

Department 88 for that purpose. Mr. Server's statement is absolutely false. (At a subsequent hearing, this court advised us that Commissioner Dickey did not send Mr. Server or anyone else to Department 88.) At no time did this declarant or anyone acting on behalf of Plaintiff, receive notice of Defendant's intention to submit any ex parte motion to this court on January 8, 1990.

"In connection with the foregoing ex parte motion on January 8, 1990, Mr. Server submitted a letter dated January 5, 1990 to this court. This letter was not received by this declarant until Tuesday, January 9, 1990. This letter contains a number of false and misleading statements. First, Mr. Server states that Judge Vogel ordered a stay of enforcement. As discussed below, Mr. SErver has repeatedly made this claim, but he has never produced an order or other indication that Judge Vogel granted Defendant's request for a stay. This declarant is unaware of any such order. Second, Commissioner Dickey did not deny the first ex parte motion 'on the grounds it should be made before Dept. 88' as Mr. Server states in writing. Third, Mr. Server claims that judgment debtor examinations are automatically stayed under Code of Civil Procedure, Section 708.200. That statute provides for protective orders. That statute provides for protective orders. It says nothing about stays, automatic or

otherwise.

"Mr. Server's letter of January 5, 1990 is improper for several other reasons. It constitutes an illegal ex parte application. This declarant received no notice whatsoever that Defendant intended to relitigate the first ex parte motion. It is also an unauthorized motion for reconsideration under Code of Civil Procedure, Section 1008. . .

"Since this court was not inclined to hear Defendant's improper ex parte application at the hearing on January 8, 1990, Mr. Server announced at the hearing that he was giving notice to have the same motion heard on the following afternoon. In order to avoid yet another costly hearing, this declarant initially objected to hearing the motion, but acquiesced in having it heard that morning, rather than the next day. After oral argument, this court issued its Ruling on Submitted Matter denying the ex parte application.

"On January 11, 1990, Defendant set another ex parte motion under the guise that it was a request to correct a 'clerical error' in the aforesaid minute order. Although this ex parte application resulted in the [judgment] debtor examination being automatically stayed, again there were a number of improprieties. First, proper telephonic notice was not given. At approximately 2:00 PM on January 10, when I returned from court, I received a telephone message that Mr. Server had called. I returned his call and left a message because he was not in. At 6:20 PM, Mr. Server called my office to 'confirm' the ex parte motion the following day. When I told him that I had received no notice, he told me that he had spoken with my 'personal secretary' before noon. Since I found it odd that Mr.

Server was giving me the courtesy of a confirming call, which he has never done in the past, I questioned my secretary the following day. She advised me that she never spoke with Mr. Server or his office the previous day. I found out that the message had been taken by our office manager, Thelma Weltman. Mrs. Weltman received a telephone cal from someone identifying himself as Mr. Server after 12:00 noon on January 10, 1990. At no time was she advised that there was an ex parte hearing the following day or at any other time. These facts are contained in the declaration of Thelma Weltman dated January 11, 1990 which was furnished to the court at the ex parte hearing on that date. . . What is curious about these events is that the declaration of notice in the Amended Ex-Parte Request for Correction of Clerical Error, etc. states that an employee of Mr. Server called my office, not Mr. Server (as he told me the prior evening).

"In addition to the question regarding notice of the ex parte hearing on January 11, there are other procedural questions. Regardless of the merit of Defendant's claim regarding the automatic stay, Defendant's ex parte request for correction of clerical error is nothing more than an unauthorized motion for reconsideration. It should have been made, if at all, upon notice. Furthermore, there never was a 'clerical error[.'] The court's citation of Code of Civil Procedure, Section 708.010 in the ruling on submitted matter was made because Defendant himself cited that statute in his prior ex parte motion. Had Defendant made his motions on notice as required by law, both Plaintiff and the court would have had ample time to ascertain the grounds and correct ruling on these motions."

On March 25, 1991, we held in an unpublished opinion (B044466) that the trial court erred in disallowing interest after June 17, 1985. We affirmed the order quashing all writs of execution, requiring court order to issue new writs of execution, and denying sanctions.

DISCUSSION

I
Award of Respondent of Costs and Attorney's Fees on Appeal

Appellant contends that the award to respondent of attorney's fees on appeal under Civil Code section 1717 was erroneous, because respondent was not the prevailing party on the contract. Appellant contends that the prevailing party on appeal may not be awarded attorney's fees under section 1717, unless that party is also the prevailing party on the contract.

4/ Once again, we will treat the appeal as by both appellant and his counsel.

Appellant asserts that he is the prevailing party on appeal and may not be awarded attorney's fees under section 1717, unless that party is also the prevailing party on the contract. Appellant asserts that he is the prevailing party on the contract and, thus, the court of appeal was without jurisdiction to award attorney's fees to respondent.

Under the doctrine of law of the case, "a matter adjudicated on a prior appeal normally will not be relitigated on a subsequent appeal in the same case. [Fn. omitted]." (Davis v Krasna (1975) 14 Cal.3d 502, 507.) "Under this doctrine, 'the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case.' [Citation.]" (Nally v Grace Community

Church (1988) 47 Cal.3d 278, 301-302.)

On August 18, 1988, in an unpublished opinion (B027482), Division Four of this appellate district affirmed the order of the trial court (except to modify the rate of interest payable) and remanded the matter to the trial court to determine the amount of costs and attorney's fees on appeal to be awarded to respondent, the prevailing party on the appeal. Pursuant to the order of the appellate court, the trial court awarded costs and attorney's fees to respondent.

Under the law of the case doctrine, we decline to revisit the appellate court's order awarding attorney's fees on appeal to respondent. We conclude that the trial court appropriately complied with the direction of the appellate court.

Appellant also contends that the trial court abused its discretion in determining the amount of attorney's fees to be awarded. The determination of the amount of an award

of attorney's fees is a matter for the discretion of the trial court. (Trout v Carleson (1974) 37 CA3d 337, 341.) A discretionary ruling of the trial court will not be disturbed on appeal absent a clear showing of abuse resulting in a miscarriage of justice. (Blank v Kirwan (1985) 39 Cal.3d 311, 331; Denham v Superior Court (1970) 2 CA1.3d 557, 566.)

In this case, the trial court reviewed the declaration of respondent in support of its motion for costs and attorney's fees. The declaration indicated that the attorney's fees were based on a billing rate of $135 per hour. The declaration also noted the number of hours billed in connection with the appeal. These hours included review of appellant's thirty-seven-page opening brief, preparation of a forty-five-page respondent's brief, opposition to appellant's request for return of appellant's appendix, opposition

to appellant's petition for rehearing, opposition to appellant's petition for review, opposition to appellant's request for stay of issuance of remittitur, and reviewing the file for purposes of settlement. We conclude that the trial court did not abuse its discretion to determining the amount of attorney's fees to be awarded to respondent.

II

JAN. 8, 1990 AWARD OF SANCTIONS

Appellant contends that the trial court abused its discretion in awarding sanctions, under Code of Civil Procedure section 128.5, for his motion to set aside the interest order from which an appeal was pending.[5/] Specifically, appellant contends that the trial court had jurisdiction to hear the motion to vacate its order from which an appeal had been taken, and that the order imposing sanctions was insufficient.

Section 128.5 provides that, "[e]very trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or intended to cause unnecessary delay."

Frivolous tactics are those that are totally without merit or for the sole purpose of harassing an opposing party. "An award of sanctions for frivolous conduct under section 128.5 is within the sound discretion of the trial court," and on review, "the trial court's exercise of that discretion will not be set aside except on a clear showing of abuse." (McFarland v City of Sausalito (1990) 3218 CA3d 909, 911.)

In this case, it is indisputable that the

5/ Appellant also appeals from the underlying order relating to the interest. In B044466, we reversed the interest order of the trial court. We need not discuss this issue further.

trial court was without jurisdiction to vacate its order from which an appeal was pending. "[T]he perfecting of an appeal stays proceedings in the trial court upon the judgment or order appeal from . . ." (Code Civ. Proc., §916.) The taking of an appeal deprives the trial court of jurisdiction to proceed. The trial court may not vacate or amend a judgment or order valid on its face. (Rosenberg v Bullard (1934) 2 CA2d 118; Kalmus v Kalmus (1951) 103 CA2d 405.)

The June 1, 1989 order was valid on its face. Appellant filed a notice of appeal from this order on August 25, 1989. The motion to set aside the June 1, 1989 order was filed on December 15, 1989, after the trial court had lost jurisdiction to vacate or set aside the order. The filing of the motion to set aside the June 1, 1989 order was, therefore, totally without merit, and the imposition of sanctions was appropriate on this basis alone. We conclude that the

trial court did not abuse its discretion in imposing sanctions.

Section 128.5 provides that the order imposing sanctions "shall recite in detail the conduct or circumstances justifying the order." All that is required is a reasonably specific written factual recital of the circumstances that led the court to find the conduct before it sanctionable. (Jansen Associates, Inc. v. Codercard, Inc. (1990) 218 CA3d 1166, 1171.) The formal written order in this case sets forth, with sufficient detail, the circumstances giving rise to the imposition of sanctions, articulates the basis for finding that appellant's conduct was in bad faith and for purposes of harassment. The order noted the pending appeal, the lack of any reasonable legal basis for the motion, and the untimeliness of the motion.

III
THE FEB. 26, 1990 ORDER

Appellant contends that the trial court abused its discretion in awarding sanctions against him for his attempts to vacate the judgment debtor examination order. He argues that since he was ultimately successful in obtaining an order vacating the examination, that his conduct was clearly not sanctionable. He also contends that the written order imposing sanctions was not adequate.

Appellant ignores the fact that sanctions were imposed not because he brought a motion to vacate the order, but because of the manner in which the motions were brought. Appellant was served with the judgment debtor examination order on October 25, 1989. It was not until December 13, 1989, that he first attempted to have the order vacated. He clearly had sufficient time to bring a properly noticed motion.

Further, his first attempt to vacate the order was by means of a clearly improper ex parte letter to Judge Vogel. On Jan. 5, 1990, he misrepresented to Judge Janavs that Commissioner Dickey had told him to bring the motion before her. He failed to give opposing counsel notice of the Jan. 8, 1990 hearing, and he apparently made ex parte contact with Judge Janavs on Jan. 10, 1990.

Finally, he misrepresented in all of his requests that Judge Vogel had stayed such a proceeding, when she in fact had only ordered that prior court approval be obtained for issuance of new writs of execution or any other kind of levy.

Under these circumstances, we cannot conclude that the trial court abused its discretion in awarding sanctions against appellant. Nor can we conclude that the written order is inadequate. The formal written order in this case sets forth with sufficient detail the circumstaces justi-

fying the imposition of sanctions. The sanctions award was based on the unnecessary use of ex parte motions and misrepresentations to the court.

Appellant's contention that the trial court erred in refusing to transfer the case to Judge Deering is clearly without merit. In our March 21, 1991 opinion, we concluded that appellant has no right to such a transfer. The trial court did not abuse its discretion in denying the order.

Appellant's contention that the trial court erred in denying his request that sanctions be imposed against respondent is also without merit. The trial court could reasonably have concluded that appellant.

Nor can we conclude that the written order is inadequate. The formal written order in this case sets forth with sufficient detail the circumstances justifying the imposition of sanctions. The sanctions award was based on the unnecessary

use of ex parte motions and misrepresentations to the court.

Appellant's contention that the trial court erred in refusing to transfer the case to Judge Deering is clearly without merit. In our March 21, 1991 opinion, we concluded that appellate has no right to such transfer. The trial court did not abuse its discretion in denying the order.

Appellant's contention that the trial court erred in denying his request that sanctions be imposed against respondent is also without merit. The trial court could reasonably have concluded that respondent did not misrepresent the nature of Judge Vogel's order, that Judge Vogel did not stay the issuance of a judgment debtor examination order, and that respondent's obtaining of the judgment debtor examination order was not a bad faith tactic.

DISPOSITION

The orders appealed from are affirmed.

In the interests of justice and in order to forestall future litigation, the parties shall bear their own costs and attorneys' fees on appeal. (See Chelios v. Kaye (1990) 219 Cal.App.3d 75.)

NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

ASHBY, Acting P.J.

BOREN, J.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH ASH, Plaintiff/Appellant,	No. 89-55380 89-55547
v.	D.C.# 89-0367-RG
COURT OF APPEAL OF CALIFORNIA, et al, Defendants/Appellees.	MEMORANDUM
JOSEPH ASH, Plaintiff/Appellee,	No. 89-55755
v.	Filed July 18, 1990
I. STERN, et al Defendants/Appellants	

Appeal from the United States District Court
For the Central District of California
Richard A. Gadbois, Jr., Dist. Judge
Argued & Submitted June 5, 1990
Pasadena, California

Before: BROWNING AND PREGERSON, Circuit Judges, and COPPLE, District Judge**

Ash seeks review of the District Court's decision to dismiss his action and deny a preliminary injunction against the California State court of appeal. The District Court based its dismissal on lack of subject matter jurisdiction and denied the preliminary injunction because the requisite

elements were not established. Cross-appellants Byrne and Stern seek review of the District Court's denial of their request for attorneys' fees and sanctions under Rule 11. Ash seeks to have the reply briefs of Byrne and Stern stricken and sanctions imposed.

The District Court correct determined that it did not jurisdiction over Ash's claim. 28 U.S.C. Section 1257(a) Supp. 1990) (If a title, right, privilege, or immunity is claimed under the U.S. Constitution, the final judgment or decree of a state court may be reviewed by the U.S. Supreme Court); Dist. of Columbia Court of Appeals v Feldman, 460 U.S. 462, 484-86 (1983) (stating that the United States district courts have no jurisdiction over challenges to state court decisions); Worldwide Church of God v McNair, 805 F2d 888, 890 (9th Cir. 1986) (holding that the district court lacked subject matter jurisdiction over a

state court judgment and that the proper procedure was to obtain review in the United States Supreme Court). The District Court properly denied the preliminary injunction because the requisite elements were not established and because it lack jurisdiction.

The District Court's denial of defendants' request for attorneys' fees and for Rule 11 sanctions was appropriate because there was nothing within the pleadings and record before the Court that indicated that the District Court abused its discretion in denying fees and Rule 11 sanctions.

This Court finds plaintiff's Motion to strike the reply brief of Byrne; strike all references by defendants to join in Stern's appeal brief; strike Stern's reply brief; and, impose sanctions against Stern and Byrne meritless.

Accordingly, Ash's motion to strike Byrne's reply brief, strike Stern's reply

·ief and portions of the defendants' brief, ıd to impose sanctions is denied. The istrict Court's dismissal of Ash's action n the ground that it lacked jurisdiction, ts denial of the preliminary injunction and ts denial of defendants request for ttorneys' fees and Rule 11 sanctions are ffirmed.

*The Honorable William P. Copple, Senior nited States District Judge, District of rizona, sitting by designation.

BEST AVAILABLE COPY

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

STERNWEST CORPORATION, Plaintiff/Respondent,	)	No. B017945
v.	)	Super. Ct. #C318375
JOSEPH ASH, Defendant/Appellant.	)	Filed July 3, 1986
EUGENE CVETKOV, et al, Defendants.	)	

APPEAL from an order of the Superior Court, Los Angeles County. Warren H. Deering, Judge. Reversed.

Law Offices of Mark S. Novak, Mark S. Novak and Craig Weinstein for Plaintiff and Respondent.

Charrow & Slee, Dennis Slee and Stanley M. Clark for Defendant and Appellant Joseph Ash.

This present appeal is the latest piece of litigation in a longstanding lawsuit wherein, in 1980, plaintiff originally sued

defendant Eugene Cvetkov who was found liable to the plaintiff for work in connection with certain gold owned by the plaintiff. In that action the present appellant, Ash, and others were joined as defendants on the theory that they were partners of the principal defendant and equally liable with him. After long and complicated litigation, Ash was found not liable to the plaintiff and was dismissed from the action and was found entitled to attorney's fees under section 1717 of the Civil Code.

After a hearing, the trial court decided that the normal attorney's fees in Los Angeles County were $120 per hour and awarded appellant a recovery under section 1717 based on the hours found to have been devoted by his counsel to his defense in this action, but denied defendant's request that such recovery for hours expended -- referred to in the record as the "lodestar" recovery -

should be enhanced because of the "novelty and difficulty of the case" and because of the long delay in calculating and paying the amount of recovery by Ash because of the work of his attorneys. We conclude that trial court erred in both respects and, therefore, reverse its order with directions.

I

The trial court denied enhancement of "lodestar fees" because it concluded that such enhancement could be awarded only in cases involving a so-called private attorneys general where the attorney's services were devoted to maintaining a public interest. In so concluding, the trial court was wrong since the trial court has discretion to grant the kind of enhancement here sought. (Vella v Hudgins (1984) 151 Cal.App.3d 515, 198 CalRptr 725.) It is true, as respondent argued, that the trial court has a wide discretion in making an award under section 1717. But here it is

clear that the denial of enhancement was not a matter of discretion, but of the trial court's erroneous view of its power. The case is, therefore, remanded to the trial court with directions to enhance the lodestar award by such factor (2, 3, 4 or otherwise) that the court, in its discretion shall deem proper.

II

The matter of interest depends on a different footing. In denying interest on the attorney's fees, the court stated in its minute order: "2. As to the claim for interest on the attorney fees, the Court, in the exercise of its discretion, denies interest even if it has authority to award same, cf. Alhambra etc. v Bloodgood 137 C.A.3d 29 (allowing interest on attorney fees awarded pursuant to authorizing payment of attorney fees). In the instant case, interest would be difficult, if not impossible, to calculate since the fees were

incurred over a period of several years in varying amounts." We regard that statement in the minutes as a finding by the trial court that interest should be awarded.

As a matter of fact, appellant's opening brief points out computation of interest on the attorney's fees involves only simply arithmetic. It is the duty of the trial court to determine a rate of interest involved, and apply that rate to the period of delay. Appellant's opening brief suggests two methods for determining the period of delay. In the present case, we regard, as the fairest period to select, the period from the filing of the appellant's claim for attorney's fees and the date of computation of the award. A litigant can scarcely be expected to pay section 1717 fees until an appropriate demand is made on him. If a claimant is delayed in filing a claim due to conduct of the obligor, that amount of delay should be considered in

determining the factor above discussed. In the present case that requires two arithmetical computations, since appellant made two claims and the court determined the "lodestar fees" on two different claims. One adjudicated in the order of November 11 and the second one, adjudicating the "lodestar fee" for 16 subsequent hours.

The interest, computed at the rate of interest selected by the trial court, should, under the terms of section 1717, be awarded to plaintiff (sic, defendant) in addition to the "lodestar fees" enhanced because of the difficulty of the case and as provided in section 1717. The total figure should be added to appellant's normal costs of appeal and other items normally included in a judgment.

III

Section 1717 provides for the payment of a "reasonable" fee. After the trial court has performed the calculations above

discussed, it shall consider whether the total award so calculated under all of the circumstances of the case is more than a reasonable amount and, if so, shall reduce the section 1717 award so that is is a reasonable figure. The total judgment, as so entered, will, of course, bear interest at the statutory rate of 10 percent until paid. (Code Civ. Proc., §685.010.)

The judgment appealed from is reversed and case is remanded to the trial court for further proceedings consistent with this opinion.

CERTIFIED FOR PUBLICATION

KINGSLEY, J.

We concur:

WOODS, P.J.

McCLOSKY, J.

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

STERNWEST CORPORATION Plaintiff & Respondent v. JOSEPH ASH, Defendant & Appellant.	B027482 (Super. Ct. (# C 318 375) Filed Aug. 13, 1988

APPEAL from an order of the Superior Court of Los Angeles County, Warren H. Deering, Judge. Modified and affirmed; remanded.

Milton B. Lipton and Stanley M. Clark for Defendant and Appellant

Feinberg, Gottlieb & Grossman and Mark S. Gottlieb for Plaintiff and Respondent.

In the latest of a series of appeals in a lawsuit which as spanned the better part of a decade, Joseph Ash appeals from the trial court's order fixing attorney's fees pursuant to the decision by this division in Sternwest Corp. v Ash (1986) 183 Cal.App.3d 74, 227 CR 807. Ash contends the trial

court erred (1) failing to award prejudgment interest as ordered by this court, (2) calculating prejudgment interest at a rate of 10 percent per annum, (3) considering only two enhancement factors in multiplying the attorney's fees award, and (4) declining to enhance the fees awarded for postjudgment motions seeking attorney's fees. For the reasons that follow, we modify and affirm the judgment.

FACTS

Sternwest Corporation prevailed in a lawsuit it commenced in 1980 against Eugene Cvetkov. The complaint in that suit also named Ash and several others as defendants on the theory they were partners of Cvetkov and equally liable. After lengthy and complex litigation including appellate review, Ash secured an order, filed April 1, 1985, that he be "awarded judgment of dismissal and be deemed the prevailing party." Because Sternwest's suit had been

based on a contract which contained a provision for attorney's fees, Ash was found to be entitled to such fees under Civil Code section 1717.[1/]

On April 10, 1985, Ash filed a memorandum of costs claiming attorney's fees for 421 hours of work from the inception of the case in 1980 until the filing of the appeal in 1982, plus an additional 16 hours following the appeal, totalling 437 hours at a rate of $10 per hourly, or $65,550. Sternwest opposed this claim, filing a motion to tax costs. A supplemental memorandum of costs was filed by Ash on October 24, 1985,

1/ All further statutory references are to the Civil Code unless otherwise noted. Civil Code section 1717 provides, in pertinent party, "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

claiming another 179.6 hours had been spent since the filing of the first memorandum.

On November 15, 1985, based on the first memorandum of costs, the trial court awarded attorney's fees for 404.5 hours at $120 per hour, for a total of $48,540. On the supplemental memorandum, fees were awarded for an additional 140.1 hours, for a total of $16, 812.

Ash appealed from the determination of the amount of the fees because although the trial court based its award on the number of hours actually expended by counsel at $120 per hour, it denied Ash's request to enhance that figure on the basis of factors such as the "novelty and difficulty of the case" and the long delay in recovering the fees.

Ash also argued the trial court should have awarded prejudgment interest from the time the legal services were rendered.

This division subsequently held the trial court had failed to exercise its

discretion because of its mistaken belief an award of attorney's fees pursuant to section 1717 could not be enhanced. The case was remanded to the trial court "with directions to enhance the lodestar award by such factor (two, three four or otherwise) that the court, in its discretion shall deem proper."[2/] (Sternwest Corp. v Ash, supra, 183 Cal.App.3d 74, 76, 227 CR 807).

We noted that although the trial court had indicated prejudgment was warranted, it had denied such costs on the basis "'interest would be difficult, if not impossible, to calculate since the fees were incurred over a period of several years in varying amount.'" (Ibid.) We held the trial court must "determine a rate of interest involved, and apply that rate to the period of delay." (Ibid., emphasis in

2/ The "lodestar award" is computed by multiplying the number of hours worked by the prevailing hourly rate for such work.

original.) The applicable period in this case was found to be "the period from the filing of the appellant's claim for attorney's fees and the date of computation of the award." (Ibid.)

Finally, our opinion recognized that section 1717 authorizes an award of "reasonable" attorney's fees. Accordingly, we gave the following direction on remand: "After the trial court has performed the calculations above discussed, it shall consider whether the total award so calculated under all of the circumstances of the case is more than a reasonable amount and, if so, shall reduce the section 1717 award so that it is a reasonable figure." (Id. at p. 77.)

Following a hearing upon remand, the trial court ruled the award of attorney's fees in the amount of $48,540 based on the first memorandum of costs should be enhanced because of the novelty and difficulty of the

case and the long delay in securing a recovery. The effect of this enhancement would be to double the award to $97,080.

The court further found, however, "that $97,080 is an unreasonable attorney fee under Civil Code §1717 and that $75,000 is a reasonable attorney fee . . ." Interest at the rate of 10 percent per annum was awarded "from April 11, 1985 (when the fees were claimed), to December 4, 1986, in the amount of $12,354.40."

As to the award of attorney's fees in the amount of $16,812 based on the supplemental memorandum of costs, the trial court ruled that amount was a reasonable fee and no enhancements were warranted. Interest at the rate of 10 percent per annum was awarded from October 24, 1985 (when the supplemental memorandum was filed) to December 4, 1986, in the amount of $1,063.14.

As to an additional claim for attorney's fees made by Ash on November 24, 1986,

following remand, the trial court awarded the amount claimed of $13,710, finding that no enhancements were warranted and the fee was reasonable. Ten percent interest was awarded from November 24, 1986, to December 4, 1986, in the amount of $37.50. Finally, Ash was awarded attorney's fees, for successfully opposing Sternwest's motion to tax costs, in the amount of $1,400 plus 10 percent interest from January 21, 1987 (the date of the hearing on that motion).

DISCUSSION

I. PREJUDGMENT INTEREST

Ash contends the trial court failed to award prejudgment interest as directed by our previous decision. Our opinion instructed the trial court to compute prejudgment interest beginning "from the filing of the appellant's claim for attorney's fees . . ." (Sternwest Corp. v Ash, supra, 183 Cal.App.3d 74, 76.) As we observed, "A litigant can scarcely be

expected to pay Civil Code section 1717 fees until an appropriate demand is made on him." (Ibid.) The trial court complied, awarding interest on each of its several awards of attorney's fees from the date Ash filed his claim. Ash's contention that interest should have run from the date of performance of the legal services which gave rise to the claim for attorney's fees is an attempt to relitigate an issue decided against him in the previous appeal. Under the doctrine of law of the case, "a matter adjudicated on a prior appeal normally will not e relitigated on a subsequent appeal in the same case. [Fn.omitted.]" (Davies v Krasna (1975) 14 Cal.3d 502, 507.)

Appellant appears to rely on the statement in our previous opinion, that "if a claimant is delayed in filing a claim due to conduct of the obligor, that amount of delay should be considered in determining the factor above discussed" (Sternwest

Corp. v Ash, supra, 183 Cal.App.3d at pp. 76-77), to argue interest should have run from the date services were rendered. This sentence does not support appellant's argument but instead indicates that any delay caused by the obligor should be considered in determining the proper enhancement of fees rather than in computing prejudgment interest.

Ash also contends the trial court erred by computing prejudgment interest at the rate of 10 percent per annum. Relying on section 3289, subdivision (a) which states, "Any legal rate of interest stipulated by a contract remains chargeable after a breach therefof, as before, until the contract is superseded by a verdict or other new obligation," Ash notes the contract between himself and his attorney provided for an interest rate of 18 percent per annum on any unpaid balance of attorney's fees and concludes the trial court erred in not

applying this interest rate to the award of attorney's fees against Sternwest. This contention is totally without merit, because Sternwest was not a party to the contract which Ash seeks to use as a standard in establishing the rate of interest.

The trial court did err, however, in utilizing an interest rate of 10 percent per annum. "In the absence of any legislative act to the contract, the rate of prejudgment interest is 7 percent (Cal.Const., art. XV, § 1). Civil Code section 3287, which governs prejudgment interest for contract claims, does not set a rate different from 7 percent (contract Civ. Code, §3291, effective January 1, 1983, which allows 10 percent prejudgment interest under certain circumstances for an action brought to recover damages for personal injury)." (Pacific-Southern Mortgage Trust Co. v Insurance Co. of North America (1985) 166 Cal.App.3d 703, 716.) Ten percent per

annum is the correct rate for postjudgment interest but not for prejudgment interest. (Code Civ. Proc., § 685.010, 685.110 Hill v Pacific Tel. & Tel. Co. (1985) 174 Cal.App.3d 1076, 1078.) The order of the trial court is modified to compute 10 percent per annum from the filing of the claim until entry of the order awarding such fees. From the time the order awarding attorney's fees was filed, interest accrues at the postjudgment rate of 10 % per annum.

III. ENHANCEMENT OF THE ATTORNEY'S FEE AWARD

Our previous opinion noted Ash had argued the award of attorney's fees "should be enhanced because of the 'novelty and difficulty of the case' and because of the long delay in calculating and paying the amount recover . . ." (Sternwest Corp. v Ash, supra, 183 Cal.App.3d 74, 76.) Upon remand for the exercise of its discretion in determining the proper amount of such enhancement, the trial court indicated it

should consider only the above-mentioned enhancements and concluded these would warrant doubling the award of fees based on the first memorandum of costs to $97,080.

However, the trial court proceeded to determine such an award would be unreasonable and instead awarded a total of $75,000 in attorney's fees on the first memorandum of costs. Ash argues on the present appeal the trial court erred in failing to consider other possible bases for enhancement of attorney's fees.

We need not reach this issue since any such error could not have prejudiced Ash, because the trial court ruled any amount above $75,000 would be an unreasonable award of attorney's fees. Even if the trial court had found other bases for enhancement applied which would justify increasing the award, its ruling regarding the reasonable amount of such fees would result in the same award of $75,000.

Ash next contends the trial court erred in enhancing only the award of fees based on the first memorandum of costs and denying enhancement of the awards based on subsequent claims. The trial court enhanced the award of attorney's fees incurred in determining the merits of the lawsuit but declined to enhance those fees incurred in litigating the issue of attorney's fees after the suit was dismissed. "The amount to be awarded as attorney's fees is left to the sound discretion of the trial court.

The trial court is in the best position to evaluate the service rendered by an attorney in his courtroom; his judgment will not be disturbed on review unless it is clearly wrong. [Citation.]" (Vella v Hudgins (1984) 151 Cal.App.3d 515, 522.) The ruling of the trial court was well within its discretion.

III. DENIAL OF ATTORNEY'S FEES FOR POST-JUDGMENT MOTION INVOLVING AWARD OF INTEREST

Lastly, Ash contends the trial court erred in denying attorney's fees for Ash's unsuccessful motion to reconsider the ruling awarding prejudgment interest.

According to Ash, because he is the prevailing party in this lawsuit, having obtained a judgment of dismissal, he must be compensated for all his attorney's fees even if incurred in unsuccessfully litigating a subsequent motion. Ash takes this principle so far that he demands attorney's fees on this appeal whether or not he prevails.

This court addressed a related contention in Sundance v Municipal Court (1987) 192 Cal.App.3d 268. The plaintiffs in that case argued the trial court erroneously failed to compensate them for hours of attorneys' time spent on issues on which plaintiffs did not prevail although the

litigation as a whole was ultimately successful. We upheld the trial court, stating: "Rather than adopt a rigid holding, we conceive it to be far more beneficial to leave it to the discretion of the trial court to determine whether time spent on an unsuccessful legal theory was reasonably incurred. Following the reasoning in Serrano v Unruh [(1982) 32 Cal.3d 621, 141 Cal.Rptr 315], however, we hold that all time reasonably spent should be compensated. Accordingly, we remand this issue to the trial court so that it may exercise its discretion." (Sundance v Municipal Court, supra, 192 Cal.App.3d 268, 274.) In the present case, it appears the trial court did exercise its discretion.

Nothing in the record before us indicates the trial court mistakenly believed it could not award attorney's fees arising from the unsuccessful motion. Rather, it clearly appears the trial court denied Ash's claim

because it considered such fees unwarranted. We find no abuse of discretion.

Ash's contention he is entitled to attorney's fees on this appeal whether or not he prevails was answered by the decision in Serrano v Unruh (1982) 32 Cal.3d 621.

Concerning entitlement to attorney's fees under Code of Civil Procedure section 1021.5 in public interest litigation, the court held, "Fees may be awarded solely to a 'successful party,' and awards are discretionary. [Fn. omitted.]" (Id. at p. 639.) The same is true under section 1717.

Attorney's fees may be awarded solely to a "prevailing party." Ash has not prevailng on this appeal and therefore is not entitled to attorney's fees. Instead, on every issue presented in this appeal, Sternwest is the prevailing party. We are aware of no authority addressing the somewhat unusual circumstances of this case, but it is clear that under section 1717

the prevailing party is entitled to attorney's fees, and Sternwest made a request for such fees. We remand this case to the trial court to determine the reasonable amount of attorney's fees and other costs expended by Sternwest in responding to this appeal.

DISPOSITION

The trial court's order is modified as follows: (1) The trial court's order awarding interest on the award of $75,000 in attorney's fees in the amount of $12,354.40 is vacated and Ash is awarded such interest at 7 percent per annum from April 11, 1985 (when the memorandum of costs was filed) to March 5, 1987 (when the order granting such costs was filed) in the amount of $9,967.81 with interest to accrue thereafter at 10 percent per annum until the judgment is satisfied; (2) The trial court's order awarding interest on the award of $16,812 in attorney's fees in the amount of $1,063.14

is vacated and Ash is awarded such interest at 7 percent per annum from October 24, 1985, to March 5, 1987, in the amount of $1,602.44 with interest to accrue thereafter at 10 percent per annum until the judgment is satisfied; and (3) The trial court's order awarding interest on the award of $13,710 in attorney's fees in the amount of $37.50 is vacated and Ash is awarded such interest at 7 percent per annum from November 24, 1986, to March 5, 1987, in the amount of $265.56 with interest to accrue thereafter at 10 percent per annum until the judgment is satisfied.

As so modified, the order is affirmed. Respondent Sternwest Corporation is to recover costs on appeal including reasonable attorney's fees incurred in responding to the present appeal. The case is remanded to the trial court to determine the reasonable amount of such costs and attorney's fees.

GEORGE, J.

We concur:

WOODS (Arleigh), P.J.

McCLOSKY, J.

19

REPORT OF COUNTY CLERK

DECLARATION OF JAMES COOK

I, James Cook, declare:

1. I am presently and have been a deputy clerk with the Los Angeles Superior Court for twenty three (23) years. I have been in charge of preparing writs of execution and calculating interest thereon in the County Records Center for ten (10) years. This declaration is made upon review of and with the approval of my supervisor.

2. It has been and remains the policy of the Los Angeles Superior Court to add all costs to the principal amount of the judgment, pursuant to the Civil Code of Procedure, and to calculate all post-judgment interest, at 10% per annum, from this total amount with interest accruing from date of entry of the principal judgment. There are no separate judgments for costs, but rather the costs become part of and are added to the total one judgment.

The total judgment, including later added costs, bears interest from the date of the original judgment. This is so regardless of when the costs requested are actually adjudicated and awarded. Normally, notations are made on the original judgment document in the margin or otherwise, though this is not required.

3. If the judgment is one of dismissal for a defendant, rather than for damages for a plaintiff, the date of the signed and filed order of dismissal constitutes the "judgment date" for purposes of the date from which the subsequent costs award begins to accrue interest. This is true regardless of when those costs are awarded.

4. In the past I have prepared several writs in the case of Sternwest Corp. v. Eugene Cvetkov, et al, Los Angeles Superior Court case no. C 318 375, for defendant Joseph Ash. In that case, Ash received a signed dismissal order on April 1, 1985.

Thereafter, he was awarded various costs (including Civil Code sect. 1717 attorney's fees). Those costs become part of the judgment of dismissal and earn 10% post-judgment interest from April 1, 1985.

5. The trial court awarded $48,540 attorney's fees in December 1985 plus $16,812 fees incurred in fee litigation. This in addition to the "ordinary" costs (other than attorney fees) which were also claimed and allowed. After appeal by Mr. Ash, the $48,540 award was increased nunc pro tunc, in March 1987, to $75,000. These awards earn interest from April 1985. In addition, Ash recovered two more supplemental fee litigation awards of $13,710 and $10,757.

6. The above described manner of interest calculation in the preparation of writs is the method used for virtually all cases I (or others to my knowledge) have prepared since I have been with this Court. Interest

classified as "pre-judgment" would appear, in Sternwest v Ash to be interest prior to April 1, 1985.

7. Defendant Ash also recovered award of costs for two appeals he won. Appellate court awards, however, are classified as separate judgments, and required a separate writ of execution. Accordingly, I have in the past prepared three separate writs in this case: Two for the appeal judgment, and a third covering all costs awarded in the main Superior Court action. In preparing a writ, I add all awards, calculate interest, and subtract credits.

I declare under penalty of perjury under the laws of the State of California the foregoing to be true and correct. Executed on September 11, 1991 at Los Angeles, California.

James H. Dempsey
Los Angeles Superior Court Clerk
By: James Cook, Deputy Clerk

DECLARATION OF NORMA DIAZ

I, Norma Diaz, declare:

1. I am and have been a clerk with the Los Angeles Superior Court for eleven (11) years, and now specialize in and supervise the preparing of writs of execution, including calculation of post-judgment interest.

2. It has been and remains the policy of the Los Angeles Superior Court, in conformity with the Civil Code of Procedure, to add all costs pursuant to cost bills to the principal amount of the judgment (if the judgment permits costs) and to calculate all post-judgment interest, at 10% per annum, on the total amount of the judgment including costs, from the date of entry of the principal judgment. Upon adjudication of costs awards, subsequent to entry of the original judgment order, those costs are to be added to the original judgment.

3. For example, if a judgment for $50,000

damages is entered in January, a Memorandum of Costs filed requesting $20,00 but not adjudicated until June, those costs become part of the original judgment for a total of $70,000, which earns post-judgment interest from January. There are not multiple judgments, one for $50,000 earning interest from January, and one for $20,000, earning interest from June.

4. In the case a defendant who recovers a judgment of dismissal (not money damages), the date of the signed and filed order of dismissal constitutes the date of "judgment" from which post-judgment interest accrues from his subsequent costs awards. This is true regardless of when those costs are actually adjudicated.

5. It is not necessary for the prevailing defendant to obtain a court order for interest from date of dismissal to date of adjudication of cost awards. The clerk automatically allows post-judgment

interest at 10% per annum to the costs from date of the signed order of dismissal whenever a writ of execution is requested, pursuant to an application (Form 38), and the party requests interest.

6. Any costs awarded after judgment become part of the principal amount of the judgment remaining, per CCP §685.090(b). There is only one writ of execution issued (per county) which covers a superior court judgment including all costs as requested.

7. Any partial satisfactions may be applied first to the interest, and then to the principal remaining. These partial satisfactions come from the Marshal levy returns and from filing of Acknowledgment of Partial Satisfactions. Such acknowledgments should not be filed when there is a Marshal return, since there would thus be a double credit.

8. Appellate costs, awarded pursuant to Appellate Remittiturs, constitute a

separate judgment, apart from the judgment in the main superior court case, and separate writs of execution are issued for them.

I declare under penalty of perjury under the laws of the State of California the foregoing to be true and correct. Executed on September 12, 1991 at Los Angeles, California.

JAMES H. DEMPSEY, CLERK
Executive Officer/Clerk
of the Superior Court

By: Norma Diaz
Deputy Clerk

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

STERNWEST CORP. Plaintiff, Respondent v. JOSEPH ASH, Defendant, Appellant	) B042634 Consolidated with) B047789 & B057200)) ORDER MODIFYING) OPINION & DENYING) REHEARING; NO) CHANGE IN JUDGMENT

FILED OCTOBER 17, 1991

THE COURT:

It is ordered that the opinion filed herein on September 23, 1991, be modified in the following particulars:

1. At the end of the second paragraph on page 2 (1st paragraph of page 2 herein), add as footnote 1 the following:

1/Sanctions were also imposed against Ash's attorney, Ralph F. Server, in B047789 and B052700. Server also appeals from the order imposing sanctions.

This footnote will not require renumbering of all subsequent footnotes.

2. On page 5 (page 6 herein), footnote 1 is deleted.

3. On page 6, the last sentence commencing on line 7 and ending on line 8 of the first full paragraph is deleted (page 6, commencing on line 10 and ending on line 11 of the 1st full paragraph, herein):

"This request was denied."

4. On page 11 (page 14 herein), footnote 4 is deleted. This footnote will require renumbering of all subsequent footnotes.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

The opinion in the above entitled matter, filed on September 23, 1991, was not certified for publication in the Official Reports.

F 2

S023658

SECOND APPELLATE DISTRICT, DIVISION FIVE
NO. B042634 (Consolidated with B047789 and B052700), L.A. Superior Court No. C318375

IN THE SUPREME COURT OF THE STATE OF CALIF.

IN BANK

STERNWEST CORP., Respondent,

v.

JOSEPH ASH, Appellant

Appellant's Petition for Review DENIED
George, J. did not participate
Arabia, J. did not participate

LUCAS
Chief Justice

Filed December 18, 1991

Supreme Court, U.S.
FILED
APR 10 1992
OFFICE OF THE CLERK

No. 91-1572

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOSEPH ASH,
Petitioner,

vs.

STERNWEST CORP.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 91-1572

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOSEPH ASH,
Petitioner,

vs.

STERNWEST CORP.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The first, second and fourth questions presented for review by Petitioner, JOSEPH ASH, are not legally cognizable in his Petition for Writ of Certiorari. Those questions are addressed to a **1988** decision of the California Court of Appeal, therefore, the Petition based thereon is clearly untimely.

The third question appears timely because it is addressed to a **1991** decision of the California Court of Appeal, however, it presents no valid federal question. In his third question (which consists of three parts), Petitioner inquires whether the "law of the case" doctrine overrides federal due process and jurisdiction guarantees. For the reasons set forth below, the "law of the case" doctrine, which is merely an application of the principle of res judicata, is a rule of substantive law that cannot, by itself, violate due process. The application of the "law of the case" doctrine did not "override" federal due process or other constitutional guarantees. Thus, none of the questions for review presented by Petitioner support the issuance of a writ of certiorari.

OPINIONS AND ORDERS BELOW

Only Exhibits A, F and G annexed to the Petition are properly included therein. Those exhibits, which consist of (1) the California Court of Appeal decision (B042634) decided September 23, 1991, (2) the denial of the Petition for Rehearing on October 17, 1991 and (3) the California Supreme Court denial of review (S023658) are the only matters that can be addressed in a timely manner by the Petition.

Exhibits B, C and D are not timely or proper subjects of the Petition. Exhibit B is the July 18, 1990 decision of the United States Court of Appeals for the Ninth Circuit. Exhibit C is the July 3, 1986 decision of the California Court of Appeal in B017945. Exhibit D is the August 13, 1988 decision of the California Court of Appeal in B027482. Exhibit E is neither an opinion nor order of any court. Exhibit E consists of two declarations prepared by Petitioner and signed by two clerks of the Los Angeles Superior Court.

COUNTER-STATEMENT OF THE CASE

The statement of the case in the Petition not only contains a number of inaccuracies, but it deliberately confuses several appellate decisions for the purpose of including the time-barred appeals in this Petition. The key to this case is to understand the distinction between the **1988** and **1991** decisions of the California Court of Appeal. In actuality, this Petition is directed against the 1988 appeal, however, because that appeal is no longer reviewable, Petitioner ostensibly addresses the 1991 appeal, even though no federal questions are presented by that appeal.

The 1988 decision by the California Court of Appeal on August 13, 1988 (B027482) (hereinafter sometimes referred to as the "1988 appeal") was based upon Petitioner's appeal from a 1987 order of the Los Angeles Superior Court in which Petitioner was awarded attorney's fees, enhancements and interest. In spite of the enhancements and the inclusion of interest for the prior two years, Petitioner remained dissatisfied. Accordingly, in 1987 he filed appeal number B027482 in which he sought

additional enhancements and pre-judgment interest on the award of attorney's fees. On August 18, 1988, the California Court of Appeal, by Justice Ronald George (now sitting on the California Supreme Court), denied Petitioner's appeal (Exhibit D to the Petition).

In his Opening Brief in the 1988 appeal, Petitioner requested attorney's fees on appeal -- whether or not he prevailed. His reasoning was that because he was the prevailing party in the trial court in 1985, any subsequent proceeding in the trial court or in the court of appeal gave Petitioner an automatic entitlement to new awards of attorney's fees without regard to success. In its Respondent's Brief, Respondent herein opposed Petitioner's request for attorney's fees if he lost the appeal; and, Respondent requested that it be awarded reasonable attorney's fees if it prevailed on that appeal, which it did.

In his Reply Brief in the 1988 appeal, Petitioner herein expressly argued against Respondent's request for attorney's fees on appeal. In its decision in B027482, the California Court of Appeal denied Petitioner's appeal and awarded costs, including reasonable

attorney's fees, to Respondent, the amount of which costs and fees was to be determined by the trial court upon remand.

Contrary to the repeated characterizations in his Petition, Petitioner not only had an opportunity to litigate and argue against Respondent's request for attorney's fees on appeal, **but he actually did so**. Nevertheless, Petitioner immediately filed a petition for rehearing on a number of grounds, including the ground that the Court did not give Petitioner an opportunity to brief or otherwise litigate the award to Respondent of attorney's fees. The Court of Appeal rejected Petitioner's false characterization and denied rehearing. To date, Petitioner has initiated approximately 18 separate unsuccessful challenges against the 1988 appeal decision on the identical grounds set for in the aforesaid petition for rehearing.

Clearly, this pending Petition cannot review the 1988 appeal. In order to overcome this jurisdictional bar, Petitioner seeks to have this Court go back more than three years under the guise of his more recent unsuccessful

appeal. Specifically, on March 20, 1989, the Los Angeles Superior Court granted Respondent's motion for attorney's fees on appeal (pursuant to the direction of the Court of Appeal in August, 1988). Petitioner filed an appeal (B042634) from that order, which appeal was denied on September 3, 1991 (hereinafter sometimes referred to as the "1991 appeal"). Petitioner's petition for rehearing was denied on October 17, 1991 (Exhibit F to the Petition) and his petition for review to the California Supreme Court was denied on December 18, 1991 (Exhibit G to the Petition).

The only issue in the 1991 appeal is whether the trial court abused its discretion as to the **amount** of the award of attorney's fees on appeal to Respondent. Nevertheless, the thrust of Petitioner's 1991 appeal was addressed to the issue of Respondent's **entitlement** to the award. Simply stated, Petitioner contended that the trial court erred in following the instructions of the Court of Appeal and the "law of the case" doctrine. As indicated in the 1991 appeal decision (Exhibit A to the Petition), the Court rejected Petitioner's argument against Respondent's entitlement to the award on the ground that the issue was

already fully decided and that there were no applicable exceptions to the "law of the case" doctrine.

Notwithstanding Petitioner's extreme persistence, every court, including the United State District, Central District of California and the Ninth Circuit Court of Appeals, has found no merit to the numerous challenges. Although all of Petitioner's attacks are based upon the claim that he was not given an opportunity to litigate the issue of attorney's fees on appeal in 1988, this position is absolutely without any factual support. Accordingly, Petitioner was not denied due process.

SUMMARY OF THE ARGUMENTS

The Petition is fatally defective for a number of procedural and substantive reasons. It is difficult to briefly summarize the improprieties because they are so wide-ranging. Accordingly, these opposition papers are organized in three general areas.

First, the Petition is untimely. Although the Petition was served on the ninetieth day after summary denial of review by the California Supreme Court of the 1991 appeal, it was filed more than three years after the

1988 denial of review by the California Supreme Court of Petitioner's unsuccessful 1988 appeal. Even the most cursory review of the Petition reveals that it is, in reality, only directed against the time-barred 1988 appeal. (The Petition is also untimely in its attempt to seek review of the 1990 decision by the Ninth Circuit Court of Appeals.)

Second, the Petition is frivolous, fictitious and raises no federal questions. The only issue in the 1991 appeal is whether the trial court erred in awarding Respondent approximately $20,000.00 in costs, including attorney's fees, on appeal. On the issue of **entitlement**, the trial court was merely following the instructions of the 1988 appeal decision. In the 1991 appeal, the Court determined that the lower court correctly followed the law of the case. This raises no federal question. As to the **amount** of the award, the standard of review under California law is the abuse of discretion standard. No federal question is raised here, either.

As for the 1988 appeal, even if this Petition were timely, it presents no viable federal question. As explained below, although Petitioner argues that he was not

given an opportunity to litigate the issue of the award of attorney's fees on appeal to Respondent, that claim is utterly false. Indeed, the entire Petition is based upon that factually incorrect premise. The 1988 appeal decision was not the result of a refusal by that Court to permit Petitioner an opportunity to litigate the issue of an award of attorney's fees to Respondent. Petitioner actually raised the issue of attorney's fees on appeal in his Opening Brief and opposed Respondent's request in his Reply Brief in that appeal. The claim of denial of due process is utterly groundless.

Third, Petitioner's substantive legal arguments are without merit. Adherence to the "law of the case" doctrine is not a deprivation of due process. Furthermore, the California Court of Appeal did not make a void order that was beyond its jurisdiction as argued by Petitioner. Indeed, it was Petitioner himself that invoked the jurisdiction of the California Court of Appeal and raised the very issues that were adjudicated. Therefore, even if the Petition were timely and raised a threshold federal question, the substantive law relied upon by Petitioner is inapplicable.

ARGUMENTS

I.

THE PETITION FOR WRIT OF CERTIORARI IS UNTIMELY.

28 U.S.C., Section 2101(c) requires that a "writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree". United States Supreme Court Rule 13.1 specifies that a petition for writ of certiorari to review a judgment from a state court of last resort must be filed within ninety days after entry of judgment or within ninety days after entry of the order denying discretionary review. These requirements are mandatory and jurisdictional. Missouri v. Jenkins, (1990) ___ U.S. ___, 109 L.Ed. 2d 31, 110 S.Ct. 1651.

On the surface, the Petition on file herein appears timely. It was served ninety (90) days after the December 18, 1991 denial of the petition for review to the California Supreme Court from the 1991 appeal. Nevertheless, the Petition is untimely because its substance

is directed against the 1988 appeal decision.

In fact, Petitioner has already sought *federal* review of the 1988 appeal decision on the exact same grounds raised in his Petition. On March 1, 1989, Petitioner filed a civil rights action in the United States District Court, Central District of California (CV89-00367-RG) against Respondent herein and the Los Angeles Superior Court and the California Court of Appeal. The federal action was dismissed on April 10, 1989 on the ground that the District Court lacked subject matter jurisdiction over a decision by a state appellate court. On July 18, 1990, the Ninth Circuit Court of Appeal affirmed the judgment of dismissal on the ground that only the Supreme Court had jurisdiction over the state court appellate decision pursuant to 28 U.S.C., Section 1257.

By virtue of his erroneous decision to seek relief in the United States District Court, Petitioner failed to file a timely petition for writ of certiorari in this Court from the 1988 appeal. Accordingly, Petitioner is improperly attempting to obtain review of the 1988 appeal under the guise of the 1991 appeal. As discussed elsewhere

in these papers, there were only two issues in the 1991 appeal: (1) whether the trial court erred in awarding attorney's fees on appeal to Respondent pursuant to the express instructions of the Court of Appeal and (2) whether the trial court abused its discretion as to the amount of such award. Because these issues do not present a federal question, it is clear that the alleged federal questions posed in the Petition are directed solely at the 1988 appeal; therefore, the Petition is untimely.

II.

THE PETITION IS FICTITIOUS, FRIVOLOUS AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

It is axiomatic that the United States Supreme Court will not entertain a petition for writ of certiorari that is fictitious, frivolous or presents an insubstantial federal question. Duncan v. Tennessee, 1972) 405 U.S. 127, 31 L.Ed. 2d 86, 92 S.Ct. 785. Indeed, where the purported constitutional objections raised by the petitioner are insubstantial, the Supreme Court is without jurisdiction to review a judgment of the state court. Wick v.

Chelan Electric Co., (1929) 280 U.S. 108, 74 L.Ed. 212, 50 S.Ct. 41. The due process clause of the Fourteenth Amendment does not take up the laws of the states and make all questions pertaining to them constitutional questions thereby enabling the Supreme Court to review state court decisions upon questions of state law. Enterprise Irrig. Dist. v. Farmers Mutual Canal Co., (1917) 243 U.S. 157, 61 L.Ed. 644, 37 S.Ct. 318.

Although 28 U.S.C., Section 1257(a) permits the Supreme Court to review state court appellate decisions by writ of certiorari, the petition must be based, at a minimum, upon a substantial federal question. In the case at bar, no federal question whatsoever is presented in connection with the 1991 appeal. As stated above, the only two issues in that appeal were whether the trial court erred in following the instructions of the Court of Appeal and whether the trial court abused its discretion as to the amount of the attorney's fees on appeal that were awarded.

Petitioner attempts to fashion a federal question out of the foregoing issues by arguing that the appellate court's reliance on the "law of the case" doctrine

amounted to a denial of due process. This contention is absurd. The "law of the case" doctrine, like the principles of res judicata and collateral estoppel, is merely a substantive rule of law that compels one court to refrain from re-adjudicating issues that were previously fully tried. By virtue of Petitioner's super-human persistence in prolonging this case for more than twelve years, the courts have properly applied the "law of the case" doctrine. In so doing, Petitioner has in no way been deprived of due process or any other constitutional right. Indeed, in view of the fact that this Petition represents his eighteenth challenge to the 1988 appeal decision, the courts have demonstrated great patience and indulgence.

Even if Petitioner were permitted to resurrect the 1988 appeal, there is no factual or legal basis for any federal question. The Court of Appeal did not make any void orders or exceed its jurisdiction by awarding attorney's fees on appeal to Respondent. The Court acted well within its jurisdiction on the issues of attorney's fees and interest because those issues were, in fact, placed in controversy by Petitioner himself. When

Petitioner requested attorney's fees on appeal, Respondent herein argued against that request and made its own request for attorney's fees if it prevailed. Petitioner not only had a full and fair opportunity to oppose Respondent's request, but he did so in his Reply brief. Accordingly, no constitutional issue or federal question, exists in the context of either the 1988 or 1991 appeal decisions.

III.

THE PETITION IS WITHOUT MERIT AS A MATTER OF BOTH FEDERAL AND STATE LAW.

Petitioner begins his legal arguments with the statement that he has been denied any forum for the redress of grievances. Petitioner argues that the Court of Appeal went beyond its jurisdiction and committed its "own original torts", thereby resulting in a conflict between "federal Constitutional due process and State law". These serious-sounding charges are completely without factual or legal support.

As for the 1991 appeal, the affirmance of the trial court's award of $19,952.25 to Respondent herein was proper under both federal and state law. From the

procedural due process view-point, Petitioner had a full and fair opportunity to present his arguments on appeal. He filed a lengthy Opening Brief and a lengthy Reply Brief. The mere fact that he lost does not mean that the Court refused to entertain or consider his arguments.

With respect to the substantive law in the 1991 appeal, the Court reached the right conclusions for the right reasons. In applying the "law of the case" doctrine, the Court followed the recent decision from the same appellate district entitled Benson v. Greitzer, (1990) 220 Cal.App.3d 11, 269 Cal.Rptr. 201, in which the Court ruled that the "law of the case" doctrine compelled the trial court to award attorney's fees on appeal pursuant to the instructions of the higher court on an earlier appeal. As for the amount of the award, Petitioner did not overcome the presumption of correctness of a discretionary ruling of the trial court. Thus, even if these issues involve federal questions (which they do not), they were decided correctly.

Even if this Court undertook to review the 1988 appeal, it would find no federal questions and no legal errors. As for the award of attorney's fees on appeal

to Respondent as the prevailing party, there is ample authority in California for the proposition that the prevailing party on appeal is entitled to an award of attorney's fees. For example, see Montgomery v. Bio-Med Specialties, Inc., (1986) 183 Cal.App.3d 1292, 1296, 228 Cal.Rptr. 709. The cases cited by Petitioner (at Footnote 1, Page 11 of the Petition) are not applicable. Those authorities hold that the prevailing party on appeal from an *interlocutory* order is not entitled to an award of attorney's fees on appeal. In the underlying action, the appeal was from a *post-judgment* order, therefore, the award was proper under applicable statutory and decisional law.

The other issue in the 1988 appeal involved Petitioner's request for interest on the award of attorney's fees. The Court rejected his request on the ground that there was no authority for imposing interest from the date that legal services were rendered and on the ground that it was contrary to the law of the case from the earlier appellate decision rendered on July 3, 1986 in appeal number B017945 (Exhibit C to the Petition). Although the Court modified *sua sponte* the interest rate imposed by the

trial court, it was well within its power to do so because the interest rate issue was specifically placed in controversy by Petitioner in his Opening Brief wherein he requested that the interest rate be modified upward from ten percent (10%) to eighteen percent (18%) per annum.

Even if any part of the 1988 appeal decision were improper, at the very most it was a mere error at law. Petitioner's obvious dissatisfaction with the 1988 appeal does not translate into a denial of due process or any other federal law. In his 18 challenges over the course of more than three years, Petitioner has cited the same inapplicable cases for the same erroneous factual and legal propositions. To date, every court has considered, then rejected Petitioner's interpretations of both the facts and the law. The 1988 appeal decision was not a void order or beyond the jurisdiction of the court. On the issue of Petitioner's claim that the order is void, the courts have consistently followed the clear holding of Wells Fargo & Co. v. City of San Francisco, (1944) 25 Cal.2d 37, 152 P.2d 625 [holding that an erroneous award of costs is not beyond the jurisdiction of the court and is not a void order], rather than

Petitioner's strained interpretation of Jones v. World Life Research Institute, (1976) 60 Cal.App.3d 836, 131 Cal.Rptr. 674 (cited at Page 12 of the Petition).

In addition to the foregoing, Respondent is compelled to briefly address Petitioner's arguments regarding his unsuccessful foray into the United States District Court and Ninth Circuit Court of Appeals. At Pages 24 through 32 of the Petition, Petitioner mounts a direct challenge to the decision of the Ninth Circuit Court of Appeal in case number 89-55380, filed July 18, 1990 (Exhibit B to the Petition). The thrust of Petitioner's argument is that he should have been permitted to obtain injunctive relief in the federal trial court against the 1988 appeal decision. As indicated in the decision of the Ninth Circuit Court of Appeal, the United States District Court did not have jurisdiction over Petitioner's claim. Under 28 U.S.C., Section 1257(a), only this Court has jurisdiction to review the final decision of the highest court of a State. Nevertheless, even if the United States District Court and the Ninth Circuit Court of Appeal were wrong, Petitioner's pending challenge is clearly untimely. Nevertheless, even

if the Petition constituted a timely appeal or petition, it is substantively without merit. The cases cited by Petitioner, such as Miofsky v. Superior Court of California, (9th Cir. 1982) 703 F.2d 332 were expressly disapproved in World Wide Church of God v. McNair, (9th Cir. 1986) 805 F.2d 888 [citing District of Columbia Court of Appeals v. Feldman, (1983) 460 U.S. 462, 103 S.Ct. 1303].

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be summarily denied. Petitioner and his attorneys have managed to prolong this case for more than twelve years, seven of which have been devoted exclusively to his quest of post-judgment attorney's fees. Petitioner has filed seven direct appeals and a multitude of petitions in the original action, as well as, the aforesaid federal court action and a separate state court malicious prosecution action (which has been

dismissed and affirmed on appeal). For the reasons set forth above, this Court must deny the Petition and put an end to this ongoing frivolous litigation.

Dated: April 9, 1992

Respectfully submitted,

FEINBERG, GOTTLIEB & GROSSMAN

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Supreme Court, U.S.
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MAY 7 1992
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(3)

No. 91-1572

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

JOSEPH ASH,

Petitioner

v.

STERNWEST CORP.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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I. THE ISSUE IS CONSTITUTIONAL ACCESS TO SOME COURT WHEN A STATE COURT VIOLATES PRECEPTS OF DUE PROCESS GUARANTEES, AND THE PEOPLE HAVE NO WHERE ELSE TO TURN

A. DUE PROCESS HEARING IS A RIGHT, NOT SUBJECT TO "DISCRETION" AS HAS OCCURRED HEREIN

This Reply is being written after the city around us has been torched and looted, partially sparked by frustrations of people who believe the judicial system does not reflect justice or the real world.

The timing is uncanny, bearing relevance to the issues at bar- access to some court when due process is denied.

In fact, this brief was at the printers on Vermont Ave. when that print shop burned to the ground. Being forced to re-write this brief now allows us to illustrate what was a merely academic argument before.

For this case involves access to some court system, state or otherwise, when the system fails. When an appeal judge goes beyond his jurisdiction (makes an original

order on an issue which was final and not appealed, not before the court, not briefed, later found to contrary to substantive law) and deprives the litigant of his property without any due process.

Due process is a Constitutional guarantee. Contrary to Respondent, this is not merely a question of state law adjudication.

And although Respondent argues that Petitioner's arguments regarding this were later adjudicated and rejected by numerous courts, the truth is that the only means of review was by "discretionary review."

And no discretionary review or hearing was ever afforded. Petitions to recall the remittitur (mandate) were denied without comment. No adjudication on the merits or legality of these matters has occurred.[1/]

[1/] Further, Stern's emphasized statement that Ash actually litigated the propriety of the **Civil Code** (CC) **§1717** attorney's fees awarded in the appeal before Justice George is false and misleading.

FOOTNOTE 1 CONTINUED NEXT PAGE

B. THERE WAS NEVER ANY DUE PROCESS ADJUDICATION IN THIS CASE

Despite Respondent's attempts to belittle this appeal, and mischaracterize the facts, issues, and law, we cannot think of a more pressing issue now before the U.S. Supreme Court in light of the turmoil in this country (resulting from people's belief that they have no legal recourse when the Calif. state judicial system fails).

For what happens when a state court justice acts performs an arbitrarily and unlawful original act, in direct violation of Constitutional due process, and a

---

FOOTNOTE 1 CONTINUED

Stern never asked for CC §1717 fees in its brief. Stern only asked for fees under **Rule 26, Calif. Rules of Court.** Ash replied that Rule 26 does not permit attorney's fees (**Cuesta v Superior Court** (1984) 152 CA3d 945, 950, 200 CR 1, **Visini v Visini** (1963) 212 CA2d 183, 191, 192, 27 CR 782), except for frivolous appeal.

The Court of Appeal did not find the appeal frivolous nor award fees under Rule 26. It awarded them under CC §1717, which was neither requested nor briefed, and later legal research showed is prohibited.

litigant is denied any forum to complain to?[2/]

This case appears tainted with political considerations.[3/]

2/ See quote from **Robinson v Ariyoshi** (9th Cir 1985) 753 F2d 1468, at page 28 of our Petition: "we are concerned that such a result might deprive plaintiffs of any forum, state or federal . ."

3/ Appellate Justice George, who rendered the order, was subsequently appointed to the state Supreme Court. And the state Supreme Court, the only state means of review, thereafter rejected all attempts to obtain discretionary review.

When Ash then sought injunctive relief in the federal courts for violation of Constitutional due process, the courts refused to address the merits, stating this was a state court matter only and suggesting Appellant take it back there, which he did.

Ash's motion in the state trial court that it not follow the appellate order for an award against him, because the order was void as violating the Constitution, was met with a refusal to adjudicate the matter.

That trial judge, (who was in contention for and was subsequently elevated to an Appellate Justice) stated that though the appellate order might be (and appeared to be) in violation of law, she would not question the order of the Justice.

When that order was appealed, the state Court of Appeal refused to look into the merits, despite the fact that it was void and never briefed, stating that Appellate Justice (now Supreme Justice) George's decision was "law of the case."

In essence, Ash never received any due process hearing, (and Respondent cannot document any except to argue that summary denials of applications for discretionary hearings is "adjudication").

It appears that expediency or politics considerations may have overruled Constitutional guarantees (and state substantive law which prohibited any award against Ash).

C. HAVE THE STATUTES PROVIDING FOR FEDERAL COURT INTERVENTION FOR CONSTITUTIONAL STATE COURT VIOLATIONS BEEN ABROGATED?

When confronted with political judicial bias resulting in due process denial, one looks to the federal court system.

28 USC 1343(3) and 42 USC 1983 were specifically enacted to permit access to the federal courts when the state courts failed.

Pages 22-34 of the present Petition outline various federal cases which uphold U.S. District Court intervention when Constitutional guarantees are violated in

civil cases. However, the Ninth Circuit held, in this case, that **Dist. of Columbia Court of Appeal v Feldman** (1983) 460 US 462, 103 S.Ct. 1303, has now closed the door to federal remedies of such state court violations, in essence abrogating due process in some cases.

In the present insurrection in Los Angeles, stemming **inter alia** from the acquittal in the Rodney King state court beating trial, the U.S. attorney immediately moved to establish possible federal civil rights violations under these statutes. So what is the difference?[4/]

Indeed, in Rodney King, a **trial actually**

4/ Coincidentally, the very state Appellate Court and justices whose order is now on review are the same justices who orders transferred the Rodney King trial out of Los Angeles to conservative Simi Valley, and who upheld a sentence of five years probation for the killing of a black teenager at a grocery store. Both judicial decisions sparked the L.A. riot.

occurred. In the case at bar, deprivation occurred without any due process. In fact, that deprivation occurred in violation of state statutes which prohibit the very appellate order which was made, precisely because there was no due process briefing.

What we are saying is that too often judicial decisions are made which are divorced from existing reality.

Arbitrarily making a decision, and then judicially "deeming" it correct or "adjudicated" when it is not, because of ego or political considerations, does not set the matter at rest.[5/]

5/ The public does tolerate occasional judicial errors. But widespread frustration from a belief of unfairness or lack of due process merely adds under the surface to a "San Andreas" like pressure.

The Petitioner's family is well aware of the consequences. For several days now, one of its members, who puts out a local newspaper, has extensively covered the insurrection and talked with its participants. One of the Ash buildings was directly threatened with arson in the riot (and was even torched years ago).

The matter is finally before this Court.

It can clarify **Feldman** and rule that U.S. District Courts have always been open to enjoin Constitutional violations which were not addressed in state courts; that a lucky rare U.S. Supreme Court discretionary hearing each time is not the only means to sue for due process denial.

Or it can order the state court hear and "adjudicate" the matter, not rely on the non-applicable excuse of "law of the case."

Or it can do nothing. Ash has patiently endured years of litigation in seeking relief by judicial means, all the while being taunted by Respondent with cries of "litigious" and "frivolous," despite the fact that it is Ash who was sued and won.

We can only hope that every future litigant will be as patient and tolerant when state court judges trample on their Constitutional guarantees, with no redress.

We suspect that is an unreal hope.

III. ALL ISSUES ARE NOW BEFORE THIS COURT BECAUSE ASH HAS LOGICALLY FOLLOWED ALL COURT DIRECTIONS, WHICH HAVE CULMINATED IN THIS PETITION

A. THIS HAS BEEN ONE LONG CONTINUOUS LITIGATION, NOT SEPARATE ONES

Respondent argues that the issue of due process and the right to seek redress in the U.S. District Court is precluded from appeal because that is a separate action.

Not so. This has been one long continuous adjudication of one issue since the Justice George decision to the present.[6/]

6/ Stern also argues Ash is litigious because the case has dragged on so long.

What it fails to mention is that it is Stern which sued Ash, and lost, after many years of litigation, and was ordered to pay the fees of Ash's defense. Now that Ash is challenging an order regarding those fees, Stern is bootstrapping on the length of the very litigation it brought and lost, in order to defeat that challenge.

Ash has aggressively pursued this challenge, despite hardships caused by the delays of Stern and the judicial system. He cannot be prejudiced for this.

Furthermore, justice is not measured by time, as long as rights are not sat upon. It took 17 1/2 years for two incarcerated inmates to recently prove their innocence in Los Angeles, and their appeals and challenges were not ongoing as Ash's are.

For Ash has continually sought a hearing on J. George's decision without success.

And the federal court referred it back to the state court. To have appealed to the U.S. Supreme Court at that time would have been futile, as long as there was any state relief possible as suggested by the federal court. It would also violate the policy against "piecemeal litigation."[7/]

7/ "It is agreed that the purpose of the final judgment rule is to prevent piecemeal appeals and to allow trial courts to correct their errors before harm is done.

"Perhaps the simplest definition is that a decision is final when it terminates litigation on the merits, leaving nothing to be done but to enforce what has been determined. **Parr v United States** (1956) 351 US 513." **Lavine & Horning, Supplement to Manual of Federal Practice**, §8.3.

We also note that on the one hand Stern complains about reference to the federal appellate decisions in this petition, and yet on the other hand brings in, for emotional appeal, Ash's malicious prosecution action, which is irrelevant.

(On this point, we note that though that malicious prosecution action was dismissed, it was done for failure to serve within two years, and is still on appeal and on the grounds that collateral action was ordered stayed by a trial judge pending final adjudication of this present action).

Now that the state appeal court has refused to adjudicate the matter, thus resulting in denial of Constitutional due process, the logical step would be to file for injunctive relief in the U.S. District Court. However, that Court and the Ninth Circuit have already ruled that this is precluded, and that relief in the state court, creating a "Catch 22" situation.

B. UNDER RESPONDENT'S LOGIC, THERE COULD NEVER BE ANY DUE PROCESS HEREIN

If one were to accept Stern's argument, then what has occurred is a "de facto conspiracy" to deny due process. The state court will not hear it. The federal court said it could still be heard by the state.

But the state court again refused, even on direct appeal. The federal court already said it will not hear it, and even threatening sanctions the first time.

But Stern now says even the U.S. Supreme Court cannot rule a forum, thus deepening

the due process denial.

There is something very un-American about any judiciary which would deprive a litigant of any recourse, state or federal, to review an act which erroneously deprives a person of his property without so much as a briefing and in violation of Constitutional due process, just because that judge was an appellate judge rather than a trial judge.

The recourse has always the federal courts and the federal statutes. We do not believe that **District of Columbia Court of Appeal v Feldman** (1983) 460 US 462, 103 S.Ct. 1303, took away that basic right.

For if this is so, as the federal court stated in this case, the judicial "safety valve" has been closed, only adding to the potential pressure which occurs when people believe the judiciary provides no recourse.

Is federal relief from Constitutional due process violations by the state court only available for deprivation of freedom

via the habeas corpus process, but denied if one is deprived of his property?

IV. A REVIEW OF THE FACTS OF THIS CASE SHOW THAT THE ISSUE IS LACK OF OF DUE PROCESS JURISDICTION

With Respondents's Opposition Brief, our Petition may be a little confusing as to what orders and issues are on review.

This petition involves the question of Constitutional Due Process under the 5th and 14th Amendments. This single issue of Due Process has been bandied back and forth from the state court to the U.S. District Court and Ninth Circuit Court of Appeals and back again, upon suggestion of the federal court, for adjudication by the state court, which upon proper appeal refused to adjudicate it.

ASH WAS SUED, WON, BUT AN APPELLATE JUDGE THEN WENT FAR AFIELD OF HIS JURISDICTION

Petitioner Ash was sued and prevailed after years of what the Court of Appeal stated was "difficult and complex litigation," and was found entitled to

reimbursement of his attorney's fees.

Upon Ash's appeal from inadequacy of those fees, Calif. Appellate Justice Kingsley in a published decision, ordered enhancements and pre-judgment interest (Appendix Exhibit [AE] "C").

When the trial court erred in merely ordering 10% interest per annum from April 1985 (the date of judgment of dismissal), which the Court Clerk automatically adds as statutory post-judgment interest without necessity of court order, Ash appealed.

Ash specifically limited his appeal "TO THE EXTENT THAT NO INTEREST IS APPLIED OR AWARDED FOR PERIODS **PRIOR** TO APRIL 11, 1985.

Upon Justice Kingsley's retirement, Justice George, new both to the Appeal Court and to civil litigation (having been a criminal judge) held that pre-judgment interest had been properly awarded (AE "D").

However, **Justice George decision went far beyond misunderstanding of the issue in**

front of him. He then **reduced** the April 1985 10% interest (which was automatic statutory 10% interest) to 7%.[8, 9/]

This was a matter which was not in front of the Appeal Court. All post-April 1985 interest was **excluded from appeal and final.**[9/]

Thus Justice George had no jurisdiction over this matter; he exceeded Constitution-

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[8/] Subsequent declarations by the Superior Court Clerks in charge of computing post-judgment interest for the last 23 years state that Justice George's assumptions and understanding of pre versus post-judgment interest was entirely wrong [Appendix "E"].

Note also that **Jones v World Life Research** (1976) 60 CA3d 836, 131 CR 674, holds that improper calculation of post-judgment interest is a **void** decision, not merely an erroneous one.

[9/] Contrary to Stern's statement at page 18, the post April 1985 interest rate was **not** specifically placed in controversy nor did Ash request that the interest rate be modified upward from 10% to 18%.

Post April 1985 interest was automatic 10% post-judgment interest, and Ash did not appeal from this. He only appealed from denial of interest for periods **prior** to April 1985, of which no interest had been awarded, and requested such pre-April 1985 pre-judgment interest should be set at 18%, the contract rate, when it was awarded.

al due process; it was not even briefed.[10/]

[10/] **Witkin, Cal. Procedure,** Appeal §153:

"Rule 1 of the Rules on Appeal refers to an appeal from a judgment or a 'particular part thereof," and it is the settled rule that a party may appeal from **part** of a severable judgment. (Emphasis in original). The effect of such an appeal is that only the part appealed from is brought up for review.

"**The rest of the judgment becomes final, the appeal court has no jurisdiction to review it, . .**" (**Whalen v Smith** (1912) 163 C 360, 125 P 904; **Ganahl Lumber Co. v Weinsveig** (1914) 168 C 664, 667, 143 P 1025; **Lake v Superior Court** (1921) 187 C 116, 119, 200 P 1041; **Glassco v El Sereno Country Club** (1932) 217 C 90, 17 P2d 703 [language of notice of appeal held determinative]."

In **Blum v San Francisco** (1962) 200 CA2d 642, 19 CR 574, litigant recovered judgment but was denied pre-judgment interest for a specified period of time, and appealed from said denial. Respondents argued that the appeal opened the door "to consideration of the correctness of the other matter from which no appeal was taken."

No said the Court, an appeal from denial of interest for "a specified period of time" does not affect the other part of the judgment, and so is severable; "ALL OTHER MATTERS DETERMINED DETERMINED BY THE JUDGMENT ARE FINALLY ADJUDGED."

See also **Estate of Hubbel** (1932) 216 C 547, 15 P2d 503 (cited in **Blum**) permitting an appeal for more interest without affecting the finality of the rest of the judgment.

Justice George then went even further in due process denial. **Without affording any briefing or hearing on the matter, and stating he was "aware of no authority addressing the somewhat unusual circumstances of this case,"** he ordered attorney fees (some $20,000) to Stern as "prevailing party" (AE "D" page 17).

A mandatory rehearing was denied upon timely petition (Ash trying to state that there was authority prohibiting such award as well as addressing the matter of jurisdiction over issues excluded from appeal).[11/]

11/ Violation of due process or excess of jurisdiction (i.e. rendering orders on matters not on appeal) is always a void order. However, even an award of costs (after hearing) where such costs is not allowed is a void order under Calif. law.

At page 18, Stern cites **Wells Fargo v San Francisco** (1944) 25 C2d 37, 152 P2d 625, as "holding that an erroneous award of costs is not beyond the jurisdiction of the court and is not a void order." That case does not stand for that nor has anything to do with erroneous cost awards.

The operative case is the Supreme Court case of **Abelleira v Dist. Court of Appeal**

FOOTNOTE 11 CONTINUED NEXT PAGE

A timely petition to the state Supreme Court was summarily denied.

Contrary to law, Stern states this denial was "adjudication."[12/]

FOOTNOTE 11 CONTINUED

(1941) 17 C2d 280, 289, 109 P2d 942, which held that a court "cannot award costs in a situation not provided by statute. **Michel v Williams** (1936) 13 CA2d 198, 576 P2d 546," is **void**, and can be collaterally attacked.

Michel: "The Court was without authority to enter (such) a judgment for costs."

Jones v World Life Research Institute (1976) 60 CA3d 836, 131 CR 674, which Stern argues is not applicable, specifically examined **both Wells Fargo** and **Abelleira**.

Jones concluded that the Calif. Supreme Court had declared that a judgment for costs where such costs were not allowed is **void**, and further that improper calculation of interest was a **void** order.

12/As stated in **Cal Rules of Court, Rule 28 Advisory Committee Comment**: "It has long been established in Cal. law that a denial of hearing is not an expression of the Supreme Court on the merits of the cause. (**E.g. People v Davis** (1905) 147 Cal.346, 350; **People v Triggs** (1978) 8 Cal.3d 884, 890-91). Adoption of the new "review" procedure does not affect this legal doctrine, and denial of review will not be an expres-sion of the opinion of the Supreme Court on the correctness of the judgment of the Court of Appeal or on the correctness of any discussion in the Court of Appeal opinion.

THE FEDERAL COURT REFUSED TO HEAR THE MATTER

Ash then sued for injunctive relief (not damages) in U.S. District Court for denial of Constitutional due process. The court dismissed for lack of jurisdiction, referring the matter back to the state court, and the 9th Circuit affirmed (Appendix "B").

Following the federal decision, Ash moved the state trial court to examine whether J. George's order was void, and to strike Stern's $20,000 claim. The trial court refused to adjudicate it.[13/]

13/ The trial judge (in contention for appellate justice) refused, stating "I am not going to hear argument on it. . I will not disregard an order of the court of appeal. He (Ash's attorney) can cite authority to me until the cows come home." (Appeal #B042634 Reporter's Transcript [RT] page 3).

The trial judge also based her decision on the fact that the state supreme court refused to review the case (though they refuse to review virtually any civil case these days). She stated, contrary to the law in footnote 12, that if the Court of Appeal was wrong, then the supreme court "will certainly tell them that. . it's a hint that they weren't offended by anything that happened in this case." (#B042634 RT p. 10).

THE STATE COURT STILL REFUSED ADJUDICATION

Appeal #B042634 was taken from that trial judge's order. But the state court of appeal refused to look it, stating that J. George's previous order was "law of the case." It (Appendix "A") is now before this Court, allowing review of this entire matter following exhaustion of all other remedies.

Ash went to all courts, as directed, and has been turned away without so much as a hearing. Thus the issue is what does he do.

If both the federal and state courts refused due process, this Court should direct some hearing to some court.

This has been one continuous case, which has ripened to the point that for the first time, review is proper before this Court, and encompass all the Constitutional issues which form the basis of this case.

Respectfully submitted,

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Counsel of Record